

**REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.1b**

**TITLE:** **Next Steps on Uniform Board Member Integrity Screening Process**

**Documents**

The following attachment is relevant to the Board’s consideration of the next steps on the Uniform Board Member Integrity Screening Process.

Attachment A is [Proposed Screening Process](#) document that was published for public comment from 2 March through 17 April 2018.

Attachment B is the [Report on Public Comments](#), published on 1 May 2018.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 12 July 2018

Email: amy.stathos@icann.org

# **PROPOSED UNIFORM BOARD MEMBER INTEGRITY SCREENING PROCESS**

## **BACKGROUND**

Under the Empowered Community processes, the ICANN Board and each of its members are held more accountable for their actions. Each of the nominating groups (the ASO, ccNSO, GNSO, At-Large Community and Nominating Committee for Board Directors, and the GAC, IETF, SSAC, and RSSAC for Board Liaisons) have community-specific processes in place to select ICANN Board Directors and Board Liaisons (collectively, Board members) in accordance with the ICANN Bylaws.

The Board and the community have discussed the need to ensure that prospective Board members are adequately vetted to ensure that each is willing and able to perform the fiduciary and general obligations of service, and capable of upholding the reputation and credibility of the Board. The Nominating Committee, the At-Large Community, and the ASO each currently incorporate an external screening process, facilitated by ICANN Org, to screen prospective Board members prior to finalizing their selection process. Among other things, this external process includes review and as verification of CVs, criminal record checks, professional license verifications, media coverage, etc. Other SO/AC/liaison groups that select ICANN Board members have not asked ICANN Org to facilitate such external screening and it is uncertain if these bodies do any such reviews on their own accord.

Screening prospective Board member, including through interviews, reference checks and external screening, reflects generally accepted good practices and contributes to seating Board members with high levels of integrity. While conducting such due diligence cannot prevent future bad acts, it does give a level of confidence of the integrity of members at the time of seating. This is important in upholding the credibility of the Board.

On 2 November 2017, the ICANN Board passed Resolution [2017.11.02.33](#), directing the President and CEO, or his designees, to develop a proposal paper to be posted for public comment calling on relevant Supporting Organizations and Advisory Committees to consider screening both voting Directors and non-voting Liaisons uses processes similar or identical to the processes utilized by the Nominating Committee. The Board recommends the adoption of robust screening for all prospective members of the ICANN Board. This is not intended to modify other community-specific selection criteria and processes applied by any of the Board member-selecting groups. Instead, this would call for a uniform requirement that the Board should only be comprised of those who: (1) pass through an individual selection process; and (2) also pass through a screening review regarding their fitness to meet the fiduciary duties required of Board members.

### **RECOMMENDATION**

It is recommended that the Supporting Organizations and Advisory Committees adopt the following proposed Uniform Board Member Integrity Screening Process (Screening Process) for conducting due diligence over the candidates selected to serve on the ICANN Board. This is not intended to modify the other selection criteria applied by any of the Board member-selecting groups to their process. Instead, this would call for a uniform requirement that the Board should only be comprised of those who: (1) pass through an individual selection process; and (2) also pass through a screening review regarding their fitness to meet the fiduciary duties required of Board members.

### **PROPOSED SCREENING PROCESS**

The following outlines five levels of integrity screening processes commonly used in similar settings.

- **Level 1 – Basic Compliance Screening (approximately 1-2 days) –** Checks against watch lists and sanctions databases; confirm corporate registrations;
- **Level 2 – Public Records Review (approximately 7-10 days)–** Review

available open source public records, including insight into individual's history, reputation, and personal/professional background (i.e., regulatory, civil, criminal and bankruptcy filing; education check and confirmation of licenses); media, internet, blog and social media searches;

- **Level 3 – Enhanced Public Record Review (approximately 21-28 days)**– Often requiring signed releases, review credit reports, closed public records databases, expanded litigation and criminal records searches;
- **Level 4 – Reputational Review (approximately 21-28 days)**– Validation of records and information provided or received through reviews (through inquiries, interviews, and follow-on analysis); and
- **Level 5 – Investigative Due Diligence (timeline to be determined based on requirements)** – If there are indications of internal fraud, malfeasance, leaked security or confidential information or other serious matters regarding fitness to serve, violations of fiduciary obligations, compliance with law or legal requirements, launch of a formal investigation, often with outside resources.

Under procedures adopted by the ICANN Nominating Committee, the first four levels of external screening are completed prior to selection of a prospective Board member. With the exception of the interviews and reference checking, ICANN org has facilitated parts of these four levels of screening as well for the At-Large Community and the ASO using an external provider with expertise in international due diligence screening of individuals. The Nominating Committee's internal processes call for interviews and reference checks as well, which complete the reviews through Level 4. Moreover, the Nominating Committee, through its internal processes and through the external screening facilitated by ICANN org has all four levels of review conducted even when a seated Board member has been identified for re-selection. The fifth level – a formal investigation – is undertaken only in response to indications or allegations of malfeasance (such as fraud, breach of confidentiality, etc.) and is generally not otherwise indicated.

The screening process does not alter any group's ability to have an individualized selection process for Board members. Instead, this would create a uniform requirement that the Board should only be comprised of those who: (1) pass through an individual selection process; and (2) also pass through a screening review regarding their fitness to meet the fiduciary duties required of Board members.

## Summary Report of Public Comment Proceeding

Uniform Board Member Integrity Screening Process			
<b>Publication Date:</b>	1 May 2018		
<b>Prepared By:</b>	Elizabeth Le		
<b>Public Comment Proceeding</b>		<b>Important Information Links</b>	
Open Date:	2 March 2018		
Close Date:	17 April 2018		
Summary Report Due Date:	1 May 2018		
<b>Staff Contact:</b>	Elizabeth Le	<b>Email:</b>	<a href="mailto:elizabeth.le@icann.org">elizabeth.le@icann.org</a>
<b>Section I: General Overview and Next Steps</b>			
<p>Under the Empowered Community processes, the ICANN Board and each of its members are held more accountable for their actions. Each of the nominating groups (the ASO, ccNSO, GNSO, At-Large Community and Nominating Committee for Board Directors, and the GAC, IETF, SSAC, and RSSAC for Board Liaisons) employ community-specific processes to select ICANN Board Directors and Board Liaisons (collectively, Board members) in accordance with the ICANN Bylaws.</p> <p>The Board and the community have discussed the need to ensure that prospective Board members are adequately vetted to ensure that each is willing and able to perform the fiduciary and general obligations of service, and capable of upholding the reputation and credibility of the Board. Each of the nominating groups (the ASO, ccNSO, GNSO, At-Large Community and Nominating Committee for Board Directors, and the GAC, IETF, SSAC, and RSSAC for Board Liaisons) employ community-specific processes to select ICANN Board Directors and Board Liaisons in accordance with the ICANN Bylaws. Currently, only the Nominating Committee, the At-Large Community, and the ASO have incorporated an external screening process, facilitated by ICANN organization, to review selectees prior to finalizing their selection process.</p> <p>On 2 November 2017, the ICANN Board passed Resolution <a href="#">2017.11.02.33</a> directing the President and CEO, or his designee(s), to develop a proposal paper for public comment calling on ICANN's Supporting Organizations and Advisory Committees that do not currently employ a due diligence integrity screening process to seriously consider utilizing an integrity screening process similar or identical to the Nominating Committee process to screen both voting Directors and non-voting Liaisons.</p> <p>On 2 March 2018, ICANN opened the public comment proceeding seeking to obtain community input on the recommendation that the Supporting Organizations (SOs) and Advisory Committees (ACs) that do not currently employ a due diligence integrity screening process adopt the <a href="#">proposed Uniform Board Member Integrity Screening Process</a> (Proposed Screening Process) to conduct due diligence on candidates selected to serve on the ICANN Board. The <a href="#">Proposed Screening Process</a> is not intended to modify the other selection criteria applied by any of the Board member-selecting groups to their process. Instead, it is intended</p>			

create a uniform requirement that any individual selected to serve as a Board member (as a Director or Liaison) should: (1) pass through the relevant SO/AC selection process; and (2) also pass through a screening review regarding their fitness to meet the fiduciary duties required of Board members.

## Section II: Contributors

*At the time this report was prepared, a total of six community submissions had been received. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.*

### Organizations and Groups:

Name	Submitted by	Initials
GDNS, LLC	Stephen Deerhake	GDNS
Noncommercial Stakeholders Group	Rafik Dammak	NCSG
Registrar Stakeholder Group	Zoe Bonython	RrSG
Registries Stakeholder Group	Paul Diaz	RySG

### Individuals:

Name	Affiliation (if provided)	Initials
Alfredo Calderon	eLearning Consultant	AC
Vanda Scartezini	Polo Consultores Asociados	VS

## Section III: Summary of Comments

*General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).*

ICANN organization received six comments in response to the [Proposed Screening Process](#). Four of the six comments were received from the following organizations or groups: GDNS, LLC, Registries Stakeholder Group, Registrar Stakeholder Group, and the Noncommercial Stakeholders Group. The comment submitted by the NCSG was submitted after the closing of the public comment period, but has been included in the analysis below. Two comments were received from the following individuals: Vanda Scartezini and Alfredo Calderon.

In general, the commenters (RrSG, NCSG, AC, VS) were in support of a uniform screening process across all SOs and ACs regardless if certain SOs or ACs currently perform their own screening process.

Two commenters (NCSG and GDNS) expressed concerns in specific areas of the [Proposed Screening Process](#) that are discussed further in the Analysis section below. Specifically, the NCSG expressed concerns regarding the feasibility of access to documents required as part of the screening process in certain regions and its impact on the timelines in the [Proposed Screening Process](#).

GDNS expressed concerns about how the Proposed Screening Process might impact Board

member selections of the SOs and ACs that elect, rather than appoint Board members. GDNS also noted concerns that the proposed Screening Process contains no objective criteria that would govern the disqualification of a prospective Board member, and how the screening can be conducted without a risk to reputational harm.

One commenter, RySG, stated that it was unable to commit the time to a thorough review of the [Proposed Screening Process](#) due to a number of other pressing issues over the comment period and, therefore, the RySG was not able to offer comments at this time.

#### **Section IV: Analysis of Comments**

*General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.*

ICANN organization appreciates all the comments and suggestions added to the public forum for the [Proposed Screening Process](#). ICANN organization understands the importance of holding the ICANN Board and each of its members accountable for their actions and will refine the [Proposed Screening Process](#) if needed and appropriate to address the comments received.

#### **NCSG’s comment regarding timelines and access to documents**

The NCSG acknowledged that in order for the Proposed Screening Process to work, due diligence should be applied in a uniform manner. The NCSG expressed concerns that “[t]he timelines given under the Levels 1-4 of the integrity screening process may be difficult to maintain for candidates coming from countries where many of the documents referred to would not be available in public, or online databases.” The NCSG further noted that “government bureaucracies differ in their prioritisation of these kind of requests for information. This could lead to delays, or it could place ICANN in a position where candidates are insufficiently screened before being appointed to the Board. We would not want to see candidates disqualified due to barriers linked to the nature of their country’s public records system or online presence.” The NCSG sought clarification on “how this set of issues would be handled in order to ensure that the eventual composition of the Board reflects the diversity of the ICANN community.”

ICANN organization appreciates the importance of the issues raised by the NCSG. ICANN organization acknowledges that it serves a diverse community and that the rules and procedures, as well as timing, of access to records may vary with different regions. The five levels of screening and estimated timing for each level set forth in the [Proposed Screening Process](#) are intended guidelines of the screening processes commonly used in similar settings. As noted in the [Proposed Screening Process document](#), the specified timing for each level are approximations, and not meant to serve as a strict timeline of when a specific screening level should be completed.

#### **GDNS’ comments regarding potential impact on SOs and ACs that elect rather than appoint Board members**

GDNS raised a number of concerns. First, GDNS expressed concerns of how the [Proposed](#)



[Screening Process](#) might impact Board member selections of the SOs and ACs that elect, rather than appoint Board members. Second, GDNS commented that the [Proposed Screening Process](#) “contains no objective criteria that would govern the disqualification of a prospective Board member” such as prior offences related to financial irregularities. GDNS also commented that the Proposed Screening Process does not specify who decides what is disqualifying offense and at what point in the election process is the screening performed. Finally, GDNS wrote “most dangerous of all, under this proposal, given its ambiguity, it is entirely possible that procedures may be adopted that would set up the possibility that SO/AC elections for Board members could be nullified after the fact, by arbitrary action based on subjective criteria. And that, in my view, is extremely dangerous for the Empowered Community.”

ICANN acknowledges the importance of the issues raised by GDNS. With respect to GDNS’ first concern, the [Proposed Screening Process](#) document states that the process “is not intended to modify other community-specific selection criteria and processes applied by any of the Board member-selecting groups.” ([Proposed Screening Process](#), Pgs. 2, 4.)

With respect to GDNS’ concerns relating to objective criteria for disqualification of Board members, this is addressed in the [Proposed Screening Process](#) document and related information that can be found in the [ICANN Bylaws](#). As noted in the [Proposed Screening Process](#) document, Levels 3 through 5 include enhanced public record review (i.e., review of credit reports, closed public record databases, expanded litigation and criminal searches), validation of records and information provided or received through reviews, and investigative due diligence if there are indications of internal fraud, malfeasances, leaked security or confidential information or other serious matters regarding fitness to serve, violations of fiduciary obligations, compliance with law or legal requirements. Specifically, the [Proposed Screening Process](#) document specifies that

The Nominating Committee’s internal processes call for interviews and reference checks as well, which complete the reviews through Level 4. Moreover, the Nominating Committee, through its internal processes and through the external screening facilitated by ICANN org has all four levels of review conducted even when a seated Board member has been identified for re-selection. The fifth level – a formal investigation – is undertaken only in response to indications or allegations of malfeasance (such as fraud, breach of confidentiality, etc.) and is generally not otherwise indicated.

([Proposed Screening Process](#), Pg. 3.) Further, Article 7, Section 7.11(ii) of the ICANN Bylaws also provides some insight in this regard, which provides that

(ii) The Board may remove any Director who has been declared of unsound mind by a final order of court, or convicted of a felony, or been found by a final order or judgment of any court to have breached any duty under Sections 5230 through 5239 of the CCC, and in the case of such removal, the Secretary shall promptly notify the EC Administration in writing, with a copy to the body that nominated such Director, and shall promptly post such notification to the Website. The vacancies created by such removal shall be filled in accordance with [Section 7.12\(a\)](#).

([ICANN Bylaws, Art. 7, Sec. 7.11\(ii\)](#).)

**Next Steps:** Following the completion of the public comment process, the Board Governance Committee will consider the comments provided and consult with community leaders as part of its assessment of the next steps in the [proposed Uniform Board Member Integrity Screening Process](#) including whether any changes or additions are appropriate.

**REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.XX**

**TITLE:** **Revisions to the Board of Directors’ Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy**

**Documents**

The following attachment is relevant to the Board’s consideration of the revisions to the Board of Directors’ Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy.

Attachment A is the proposed revised Board of Directors’ Code of Conduct.

Attachment B is the proposed revised Board Governance Guidelines.

Attachment C is the proposed revised Conflicts of Interest Policy.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 12 July 2018

Email: amy.stathos@icann.org

# Board of Directors' Code of Conduct

The Board of Directors (Board) of the Internet Corporation for Assigned Names and Numbers (ICANN) has adopted the following Code of Conduct ("Code") for its voting directors (Directors) and non-voting liaisons (Liaisons, collectively with the Directors, Board Members). This Code is intended to focus Board Members on areas of ethical risk, provide guidance to help them recognize and deal with ethical issues, provide mechanisms to report unethical conduct, foster a culture of honesty and accountability, deter wrongdoing and promote fair and accurate disclosure and financial reporting. The Code is not intended to override any applicable laws or any obligations pursuant to ICANN's Bylaws, Conflicts of Interest Policy, Governance Guidelines or any other applicable policies.

No code can anticipate every situation that may arise. Accordingly, this Code is intended to serve as a source of guiding principles and not absolute directives. Generally, however, the goal is to ensure that Board Members strive to foster ICANN's Mission, Core Values and Commitments in an ethical manner. ICANN's Mission, Core Values and Commitments are set forth in Article 1 of ICANN's Bylaws, which is attached as Exhibit A hereto and available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

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## A. General Statement of Expectation

1. Each Board Member is expected to adhere to a high standard of ethical conduct and to act in accordance with ICANN's Mission, Core Values and Commitments. The good name of ICANN depends upon the way Board Members conduct business and the way the public perceives that conduct. Unethical actions, or the appearance of unethical actions, are not acceptable. Board Members are to be guided by the following principles in carrying out their responsibilities. Note, however, that this Code summarizes such principles and nothing in this Code should be considered as limiting duties, obligations or legal requirements with which the Board Members must comply.
2. **Loyalty.** Board Members should not be, or appear to be, subject to influences, interests or relationships that conflict with the interests of ICANN organization or its ability to operate for the benefit of the Internet community as a whole. Board Members shall act so as to protect ICANN's interests and those of its staff members, assets and legal rights, and Board Members shall serve the interests of ICANN organization and the global Internet Community over those of any other person, group or stakeholder of ICANN.
3. **Care.** Board Members shall apply themselves with seriousness and diligence to participating in the affairs of the Board and its

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committees and shall act prudently in exercising oversight of ICANN organization, and shall be attentive to legal ramifications of his or her and the Board's actions. Board Members are expected to be familiar with ICANN's business and the environment in which the company operates, and understand ICANN's principal business plans, policies, strategies and core values.

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4. ***Inquiry.*** Board Members shall take such steps as are necessary to be sufficiently informed to make decisions on behalf of ICANN and to participate in an informed manner in the Board's activities. Board Members are expected to attend all meetings of the Board, except if unusual circumstances make attendance impractical.
5. ***Prudent Investment.*** Board Members shall avoid speculation with ICANN's assets by giving primary consideration to the probable income and probable safety of ICANN's capital assets and the relation between ICANN's assets and its present and future needs.
6. ***Compliance with Laws, Rules and Regulations.*** Board Members shall comply with all laws, rules and regulations applicable to ICANN.
7. ***Observance of Ethical Standards.*** Board Members must adhere to the highest of ethical standards in the conduct of their duties. These include honesty, fairness and integrity.

#### **B. Integrity of Records and Public Reporting**

Board Members should promote the accurate and reliable preparation and maintenance of ICANN's financial and other records. Diligence in accurately preparing and maintaining ICANN's records allows ICANN to fulfill its reporting obligations and to provide stakeholders, governmental authorities and the general public with full, fair, accurate, timely, understandable, open and transparent disclosure.

#### **C. Conflicts of Interest**

Board Members must act in accordance with the Conflicts of Interest Policy adopted by the ICANN Board, and as amended from time to time.

#### **D. Corporate Opportunities**

Board Members are prohibited from: (a) taking for themselves personally opportunities related to ICANN's business; (b)

using ICANN's property, information, or position for personal gain; or (c) competing with ICANN for business opportunities. Board Members shall exercise [prudent](#) judgment to avoid the appearance of improper influence when offered opportunities, gifts or entertainment.

## E. Confidentiality

Board Members should maintain the confidentiality of information entrusted to them by ICANN [as confidential](#) and any other confidential information about ICANN, its [operations](#), customers or suppliers, which comes to them, from whatever source, except when disclosure is authorized or legally mandated. For purposes of this Code, "confidential information" includes all non-public information relating to ICANN, its business, customers or suppliers.

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Process surrounding maintenance of confidential information can be found in the Board Governance Committee Code of Conduct Guidelines developed and amended from time to time, as the Board deems appropriate.

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## F. Board Interaction with Internet Community and Media:

1. The Board recognizes that members of the Internet community, ICANN constituency groups and the public at large have significant interests in ICANN's actions and governance and therefore the Board seeks to ensure appropriate communication, subject to concerns about confidentiality.
2. The Board notes that the President speaks for ICANN, consistent with applicable policy.
3. If comments from the Board to the Internet Community and/or Media on behalf of ICANN are appropriate, they should be reviewed and discussed by the Board in advance, and, in most circumstances, come from the Chair of the Board.

## G. Enforcement

Board Members will discuss with the Chair of the Board Governance Committee any questions or issues that may arise concerning compliance with this Code. Breaches of this Code, whether intentional or unintentional, shall be reviewed by the Board Governance Committee [or any sub-committee established by the Board Governance Committee](#) (excluding any Board Members whose breaches are under review), which, if necessary, shall make recommendations to the full Board for corrective action. Serious breaches of this Code may be cause for dismissal of the Board

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Member committing the infraction in accordance with ICANN's Bylaws and applicable law.

**H. Affirmation**

All Board Members shall read this Code at least annually, and shall certify in writing that they have done so and that they understand the Code.

**I. Review**

This Code will be reviewed periodically by the Board Governance Committee, which shall make recommendations to the full Board regarding changes to or rescinding of the Code, as deemed appropriate.

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## Exhibit A

### **Section 1.1 MISSION**

(a) The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN:

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("**DNS**") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN's scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD registrars and registries shall be deemed to be within ICANN's Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.

(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol numbers and Autonomous System numbers. In service of its Mission, ICANN (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force ("**IETF**") and the Regional Internet Registries ("**RIRs**") and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN shall not act outside its Mission.



(c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(i) the foregoing prohibitions are not intended to limit ICANN's authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("**Bylaws**") or ICANN's Articles of Incorporation ("**Articles of Incorporation**");

(A)

(1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016, including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

(C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN.

(iv) ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in

service of its Mission.

## **Section 1.2 COMMITMENTS AND CORE VALUES**

In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below.

### **(a) COMMITMENTS**

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

- (i) Preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
- (ii) Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet;
- (iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;
- (iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;
- (v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and
- (vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

## (b) CORE VALUES

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN:

- (i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;
- (ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;
- (iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;
- (iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;
- (v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;
- (vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;
- (vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; and
- (viii) Subject to the limitations set forth in [Section 27.2](#), within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental

compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.

# Governance Guidelines

(April 2018 Draft)

## Board Governance Guidelines

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### Introduction

Over the course of the existence of Internet Corporation for Assigned Names and Numbers (ICANN), the Board, consisting of voting Directors and non-voting liaisons (collectively the Board or Board members) has developed governance policies and practices to help it fulfill its responsibilities to ICANN and its stakeholders. These Board Governance Guidelines (Guidelines) provide a structure within which the Board and the organization can effectively pursue ICANN's Mission. The Board intends that these Guidelines serve as a flexible framework within which the Board may conduct its business, not as a set of binding legal obligations. These Guidelines should be interpreted in the context of all applicable laws, and ICANN's Articles of Incorporation, Bylaws, policies and processes. The Guidelines are subject to future refinement or changes as the Board may find necessary or advisable.

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### Role of the Board

The Mission of ICANN is to ensure the stable and secure operation of the Internet's unique identifier systems. The fundamental responsibility of Directors (as defined below) is to exercise their business judgment to act in what they reasonably believe to be the best interests of ICANN and for the benefit of the Internet community as a whole. Actions of the Board should reflect the Board's collective action after taking due reflection.

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It is the duty of the Board to oversee management's performance to ensure that ICANN operates with efficiency and effectiveness, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under the Bylaws, and in a manner that is responsive to the needs of the global Internet community. The Board will also be responsible for overseeing the development of ICANN's Operating Plan and Strategic Plan (each as defined in the Bylaws).

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In performing its Mission, ICANN must operate in a manner consistent with the Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN commits to do the following (the "Commitments"):

- Preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
- Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet;

- Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;
- Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;
- Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and
- Remain accountable to the Internet community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.

Additionally, the following core values should guide the Board's decisions and actions (the "Core Values"):

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- To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;
- Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;
- Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;
- Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;
- Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;
- While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

- Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; and
- Subject to the limitations set forth in Section 27.2 of the Bylaws, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission. (See Bylaws, Section 1.2(c).)

Some of the Board's key responsibilities are to ensure that ICANN's ethics are managed effectively, that ICANN as a whole (as well as individual Board members and personnel) operates pursuant to the highest ethical standards, that ICANN complies with applicable laws, and that ICANN considers adherence to best practices in all areas of operation. In overseeing the development of ICANN's strategy, the Board has a responsibility to assure that strategic work and business plans do not give rise to risks that have not been assessed by ICANN's executive management. To that end, the Board has a role in overseeing executive management in the assessment and governance of enterprise risk management and sound information technology planning to meet the long-term needs of ICANN.

Directors are individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and are not representatives of the entity that selected them, the EC (as defined in the Bylaws), their employers, or any other organizations or constituencies. (See Bylaws, Section 7.7.)

## Board Composition and Selection; Independent Directors

1. **Board Size.** The Board has 16 voting members (Directors) and four non-voting liaisons (Liaisons) (collectively Directors and Liaisons referred to as Board members). Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board.
2. **Selection of Board Members.** Board Members are selected in accordance with the procedures set forth in Sections 7.2, 7.8 and 7.9 of ICANN's Bylaws. Specifically, the Empowered Community is the sole designator of ICANN and designates, within the meaning of Section 5220 of the California Corporations Code, all Directors (except for the President ex officio) following their nominations by the Nominating Committee, Supporting Organization or At-Large Community (as these terms are used in ICANN's Bylaws), as applicable.

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Deleted: <#>deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. The Board will exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

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3. **Board Membership Criteria.** The Nominating Committee, Supporting Organizations and the At-Large Community seek to ensure that the Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience and perspective. In accordance with [Section 7.3](#) of ICANN's Bylaws, the Board is to be comprised of individuals that meet the following requirements:

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- [Accomplished](#) persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making.
- Persons with an understanding of ICANN's [Mission](#) and the potential impact of ICANN decisions on the global Internet community, and committed to the success of ICANN.
- Persons who will produce the broadest cultural and geographic diversity on the Board [consistent with meeting the other criteria set forth in Section 7.3 of ICANN's Bylaws](#).
- Persons who, in the aggregate, have personal familiarity with the operation of gTLD registries and registrars, with ccTLD registries, with IP address registries, with Internet technical standards and protocols, with policy-development procedures, legal traditions, and the public interest and with the broad range of business, individual, academic, and non-commercial users of the Internet.
- Persons who are able to work and communicate in written and spoken English.

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No official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director, and no person who serves in any capacity (including as a [Liaison](#)) on any Supporting Organization council will simultaneously serve as a Director or Liaison. In addition, persons serving in any capacity on the Nominating Committee will be ineligible for selection to positions on the Board [and no person who served on the EC Administration will be considered for nomination or designation to the Board, nor serve simultaneously on the EC Administration and as a Director or Liaison](#). (See Bylaws, [Section 7.4](#).)

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[In order to ensure broad international representation on the Board, the nomination of Directors by the Nominating Committee, each Supporting Organization and the At-Large Community shall comply with all applicable diversity provisions of the Bylaws or of any memorandum of understanding referred to in the Bylaws concerning the Supporting Organization.](#)

4. **Removal.** Any Director [designated by the Empowered Community](#) may be removed [without cause: \(i\) by the Empowered Community pursuant to and in compliance with the procedures in Section 3.1 or Section 3.2 of Annex D of the Bylaws, as applicable, or \(ii\) following notice to that Director, by a three-fourths \(3/4\) majority vote of all Directors; provided, however, that \(x\) each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director; and \(y\) such removal shall not be effective until the](#)

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Secretary has provided notice to the EC Administration (as defined in the Bylaws) of the Board's removal vote and the requirements of Section 6.4 of the Bylaws have been met.

The Board may remove any Director who has been declared of unsound mind by a final order of court, or convicted of a felony, or been found by a final order or judgment of any court to have breached any duty under Sections 5230 through 5239 of the California Corporations Code, and in the case of such removal, the Secretary shall promptly notify the EC Administration in writing, with a copy to the body that nominated such Director, and shall promptly post such notification to the Website. The vacancies created by such removal shall be filled in accordance with Section 7.12(a) of the Bylaws.

All Directors (other than the President) may be removed at the same time by the EC by the EC Administration delivering an EC Board Recall Notice (as defined in the Bylaws) to the Secretary pursuant to and in compliance with Section 3.3 of Annex D of the Bylaws. The vacancies created by such removal shall be filled by the EC in accordance with Section 7.12(b) of the Bylaws.

With the exception of the Liaison appointed by the Governmental Advisory Committee, any Liaison may be removed, following notice to that Liaison and to the organization by which that Liaison was selected, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that Liaison following such notice. The Board may request the Governmental Advisory Committee to consider the replacement of the Liaison appointed by that Committee if the Directors, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate. (See Bylaws, [Section 7.11.](#))

**5. Pre-Service Letter.** As a condition to sitting on the Board, each Director other than the President ex officio shall sign a pre-service letter pursuant to which such Director: (i) acknowledges and agrees to the EC's right to remove the Director at any time and for any reason following the processes set forth in the Bylaws; (ii) acknowledges and agrees that serving as a Director shall not establish any employment or other relationship (whether to ICANN, the EC, any body entitled to nominate a Director, or any of their agents) that provides any due process rights related to termination of service as a Director; and (iii) conditionally and irrevocably resigns as a Director automatically effective upon communication to the Director or, in the case of Board recall, communication to the Board of a final determination of removal following the processes set forth in the Bylaws (See Bylaws, Section 7.2(f)).

**6. Term Limits.** The Board has determined that it is in the best interest of ICANN and its stakeholders to strike a balance between Board continuity and Board evolution. Board members who serve on the Board for an extended period of time are able to provide valuable insight into the operations and future of ICANN based on their experience with, and understanding of, ICANN's Mission, history, policies and objectives. However, term limits ensure that the Board will continue to evolve with the infusion of fresh ideas and new perspectives. At present, Board members are not allowed to serve more than three consecutive, three-year terms on the Board, other than the President and CEO. A person selected to fill a vacancy in a term shall not be deemed to have served that term. The term as Director of the person holding the office of President will be for as long as, and only for as

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long as, such person holds the office of President and CEO. (See Bylaws, [Sections 7.7\(e\) and \(f\)](#).)

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7. **President; Board Chair and Vice-Chair.** The Board selects ICANN's President and CEO, Chair and Vice-Chair in the manner that it determines to be in the best interests of ICANN. The Board shall annually elect a Chair, and a Vice-Chair from among the Directors. The President and CEO, who serves as an ex officio Director, is not eligible to be the Chair or Vice-Chair of the Board. (See Bylaws, [Sections 7.2\(d\) and 15.2](#).)

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8. **Post-Service Limitation.** The Board has resolved that any and all Board Members who approve any new gTLD application shall not take a contracted or employment position with any company sponsoring or in any way involved with that new gTLD for 12 months after the Board made the decision on the application. (See Resolution 2011.12.08.19.)<sup>2</sup>

Following a Board Member's service on the Board, such Board Member will not disclose or otherwise use any confidential information of ICANN or confidential information of any third party obtained through the Board member's service on the Board. In addition, a former Board member should not benefit, directly or indirectly, from the knowledge gained or decisions taken while a Board member after ceasing to be on the Board.

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### Board Meetings; Involvement of Senior Management and Independent Advisors

9. **Board Meetings – Frequency.** The Board will generally hold regularly scheduled meetings throughout the year and will hold additional special meetings as necessary, subject to a minimum of four Board meetings per year. In addition, the Board generally has informal meetings from time to time to review and discuss ICANN's operations and policy matters. Each Board member is expected to attend both scheduled and special meetings, except if unusual circumstances make attendance impractical

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10. **Board Meetings – Agenda.** At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting will be posted on the ICANN website. Board meeting agendas will be set by the Chair of the Board, following consultation with ICANN management and taking into account suggestions from other members of the Board.

11. **Advance Distribution of Materials.** All information relevant to the Board's understanding of matters to be discussed at an upcoming Board meeting should be distributed in writing or electronically to all members in advance, whenever feasible and appropriate. Each Board Member is expected to review this information in advance of the meeting to facilitate the efficient use of meeting time. Each Board Member is expected to be prepared for Board meetings and provide appropriate and constructive input on matters set forth in the agenda. The Board recognizes that certain items to be discussed at Board meetings are of an extremely sensitive nature and that the distribution of materials on these matters prior to Board meetings may not be appropriate.

<sup>2</sup> [ICANN to confirm no updates to this Resolution.](#)

12. **Board Meetings – Attendance.** Board members must attend all scheduled meetings of the Board, including meetings called on an *ad hoc* basis for special matters, unless prior apology has been submitted to the Chair or the Secretary. Meetings require the minimum quorum as specified in the ICANN Bylaws. Subject to ICANN's Bylaws, Board Members may participate in a meeting of the Board or any committee of the Board through use of: (i) conference telephone or similar communications equipment, provided that all Board Members participating in such a meeting can speak to and hear one another; or (ii) electronic video screen communication or other communication equipment. Management is encouraged to invite ICANN personnel to any Board meeting at which their presence and expertise would help the Board have a full understanding of matters being considered, however invited attendees do not count toward the required quorum. Invited attendees are not permitted to vote.

13. **Implementation of Decisions.** Board decisions that are to be implemented by ICANN should be communicated in a clear and understandable manner and, when determined appropriate by the Board, with implementation timelines. The Board will monitor and oversee management's implementation of such Board decisions.

14. **Board Meetings – Minutes.** The minutes of each Board meeting shall be prepared by or under the direction of the Secretary as soon as practicable following the meeting, for approval by the Board at its next Board meeting, if feasible, or as soon thereafter as is practicable.

15. **Access to Employees.** The Board should have access to ICANN organization's Executive Team members to ensure that Board members can ask all questions and glean all information necessary to fulfill their duties. The President and CEO, together with the Board, have developed a protocol for making inquiries to the Executive Team.

16. **Access to Independent Advisors.** The Board and its committees have the right at any time to retain independent outside auditors and financial, legal or other advisors. Individual Directors may not retain outside advisors without prior Board or committee approval, as applicable. ICANN will provide appropriate funding, as determined by the Board, to compensate those independent outside auditors or advisors, as well as to cover the ordinary administrative expenses incurred by the Board and its committees in carrying out their duties. It is expected that ICANN organization will assist the Board and committees in retaining outside advisors.

17. **Compensation Consultant Independence.** The Compensation Committee has sole authority to retain and terminate compensation consultants that advise the Compensation Committee, as it deems appropriate. It is the policy of the Compensation Committee that any compensation consultant retained by the Compensation Committee must be independent of ICANN management. It is expected that ICANN organization will assist the Compensation Committee in retaining outside advisors.

18. **Executive Sessions of Non-Management Directors.** The non-management Board members will meet regularly in executive session, i.e., without management present. These executive sessions will be called and chaired by the Chair of the Board and, in the absence of the Chair,

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by the Vice-Chair of the Board. These executive session discussions may include such topics as the Chair (or Vice-Chair, as applicable) determines.

## Accountability and Review; Public Meetings

19. **Annual Report.** The Board shall publish, at least annually, a report describing its activities including an audited financial statement and a description of any payments made by ICANN to [Board members](#) (including reimbursements of expenses). This report will be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN's fiscal year. (See Bylaws, [Section 22.3](#).) The Board will oversee and ensure the integrity of this annual audited financial statement report. In doing so, the Board will ensure that it has an effective Audit Committee, made up of independent Directors.

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20. **Ombudsman.** Pursuant to Article [5](#) of the Bylaws, ICANN maintains an Office of Ombudsman, to be managed by an Ombudsman and to include such [support from the organization](#) as the Board determines is appropriate and feasible. The principal function of the Ombudsman is to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, the Board or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation and "shuttle diplomacy" to achieve these results. [The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. The annual report will be posted on ICANN's website. \(See Bylaws, Article 5.\)](#) [The Office of the Ombudsman shall also review reconsideration requests and provide the Board Accountability Mechanisms Committee with its substantive evaluation of such reconsideration requests, as provided in the Bylaws, unless the Office of the Ombudsman has recused itself in accordance with the Bylaws. \(See Bylaws, Article 4.2.\)](#)

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21. **Requests for Reconsideration.** Subject to the provisions of ICANN's Bylaws, any person or entity materially affected by any [Board or staff](#) action or inaction if such affected person or entity believes the action contradicts established ICANN's [Mission, Commitments, Core Values and/or](#) policies, [by actions or inactions of the Board or staff](#) that such affected person or entity believes has been taken without consideration of material information, [or by actions or inactions of the Board or staff that such affected person or entity believes has been taken as a result of the Board's or staff's reliance on false or inaccurate relevant information](#), may request review or reconsideration of that action or inaction. [The EC may file a request for reconsideration if the matter relates to the exercise of the powers and rights of the EC.](#) (See Bylaws, [Section 4.2](#).)

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22. **Independent Review.** [Subject to the provisions of ICANN's Bylaws, any legal or natural person, group, or entity including, but not limited to the EC, a Supporting Organization, or an Advisory Committee \(collectively, Claimant\) that has suffered an injury or harm as a result of a Covered Action \(as defined in the Bylaws\) may seek independent review of that Covered](#)

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Action to the extent the Claimant believes it violated ICANN's Articles of Incorporation or Bylaws. (See Bylaws, Section 4.3.)

## Performance Evaluation; Development and Succession Planning

23. **Annual President and CEO Evaluation.** The Chair of the Compensation Committee leads the Compensation Committee in conducting a review of the performance of the President and CEO at least annually. The Compensation Committee establishes the evaluation process for the review of the President and CEO's performance. The evaluation results are reviewed and discussed with the non-management Board members, and the results are communicated to the President and CEO. The Board Governance Committee, from time to time, is to review and advise on the effectiveness of the relationship between the President and CEO and the Board.

24. **Development and Succession Planning.** A primary responsibility of the Board is planning for President and CEO succession and overseeing the identification and development of executive talent. The Board, with the assistance of the Compensation Committee and working with the President and CEO and the human resources department, oversees executive officer development and corporate succession plans for the President and CEO and other executive officers to provide for continuity in senior management.

The Board will maintain an emergency succession contingency plan should an unforeseen event such as death or disability occur that prevents the President and CEO from continuing to serve. The plan will identify the individuals who would act in an emergency and their responsibilities. The contingency plan is to be reviewed by the Board annually and revised as appropriate.

The Board may review development and succession planning more frequently as it deems necessary or desirable.

25. **Board and Committee Self-Evaluation.** The Board Governance Committee is responsible for facilitating periodic evaluations of the performance of the Board and each of its members. To assist in the process, the Board should maintain an annual work plan that shows the required annual activities. This work plan also guides the number and timing of meetings as well as agenda formation.

Each Board committee should conduct an annual review of its charter, as well as an annual performance evaluation. Evaluation results should be reported to the Board. Each committee's report generally should include an assessment of the committee's compliance with the principles set forth in these Guidelines, the committee's charter and identification of areas in which the committee could improve its performance, including an assessment of whether the committee is constituted with Board members with the required skills necessary for that committee.

26. **Reviews of Supporting Organizations and Advisory Committees.** The Board will cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization council, each Advisory Committee (other than the

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Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board directs, will be to determine: (i) whether that organization has a continuing purpose in the ICANN structure; and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness. These periodic reviews will be conducted no less frequently than every five years, based on feasibility as determined by the Board. (See Bylaws, [Section 4.4.](#))

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## Board Compensation

27. **Board Compensation Review.** The Board will periodically review the compensation paid to [Board members that are eligible for it and have elected to receive compensation](#), and whether it is in the best interest of ICANN to increase or decrease the amount of such compensation. In doing so, the Board will follow a process that is calculated to pay an amount for service as a Director that is [not an excess benefit under the standards set forth in Section 4958 of the Internal Revenue Code of 1986, as amended](#). As part of the process, the Board will retain an independent compensation expert to consult with and to advise the Board regarding [Board member](#) compensation arrangements and to issue to the Board a reasoned written opinion from such expert regarding the ranges of reasonable compensation for any such services by a [Board member](#). After having reviewed the expert's written opinion, the Board will [have the opportunity, if needed, to](#) meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert. The Board will adequately document the basis for any determination the Board makes regarding a [Board member](#) compensation arrangement concurrently with making that determination. (See Bylaws, [Section 7.22.](#))

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## Board Committees

28. **Number, Type and Composition of Committees.** The Board may establish or eliminate Board committees as it deems appropriate, except as required or prohibited by law. Each committee will perform its duties as assigned by the Board in compliance with ICANN's Bylaws and the committee's charter.

Also as the Board deems appropriate, the Board may delegate certain functions to committees, except for those matters specifically reserved by law or by the Bylaws to be handled by the Board. Any delegation must be specifically included in the committee charter approved by the Board.

The composition of each committee will be determined from time to time by the Board with due regard to the relevant experience, expertise and skills of committee members. [Only](#) Directors may be appointed to a committee of the Board as voting members, [provided, that a Liaison may be appointed as a liaison to a committee consistent with their non-voting capacity](#). If a person appointed to a committee of the Board ceases to be a Board member, such person will also cease to be a member of any committee of the Board. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be

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removed from a committee at any time pursuant to the provisions of [the Bylaws](#). Unless appointed by the Board, the selection process for each committee chair will be set forth in each committee charter. (See Bylaws, Article [14](#).)

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29. **Committee Meetings and Agenda.** The chair of each committee is responsible for developing, together with relevant ICANN [organization](#), the committee's general agenda. The [chair](#) and committee members will determine the frequency and length of committee meetings consistent with the committee fulfilling its obligations as set forth in the committee's charter.

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## Board Education

30. **Board Member Orientation and Continuing Education.** The Board Governance Committee and [ICANN organization](#) are responsible for Board [member](#) orientation programs and for Board [member](#) continuing education programs to assist Board [members](#) in maintaining skills necessary or appropriate for the performance of their responsibilities.

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a. A formal induction and orientation programs are designed to familiarize new Board [members](#) with ICANN's businesses, strategies and policies (including these Guidelines) and to assist new Board [members](#) in developing the skills and knowledge required for their service.

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b. Continuing education programs for Board [members](#) may include a combination of internally developed materials and presentations, programs presented by third parties, and financial and administrative support for attendance at qualifying university or other independent programs. These programs should include training on Conflicts of Interest and Confidentiality.

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## Board Workshops

31. **Purpose of Workshop.** The Board will periodically hold workshops in conjunction with [ICANN organization](#) to, among other things, facilitate discussion about ICANN's overall strategic focus.

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a. At each workshop, or as often as reasonably feasible, the Board should set aside time to discuss legitimate needs, interests and expectations of ICANN's stakeholders.

b. Once every two years the Board should, in conjunction with management, ensure that the strategic focus aligns with ICANN's stated purpose, discuss and agree on ICANN's main value drivers, and assess continued engagement with all stakeholders.

## Board Policies

32. **Compliance with Existing Policies.** Each Board member must comply with the terms and conditions of these Guidelines and policies adopted by the Board, including the Board Conflicts of Interest Policy and Code of Conduct.

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A Board Member who knowingly violates these Guidelines, the Board Conflicts of Interest Policy or Code of Conduct may be subject to a system of graduated sanctions, commencing with a formally recorded warning, leading to a written reprimand, and as a result of repeated offenses leading to removal from the Board. Nothing in these Guidelines will limit the ability of the Board to remove a Board member pursuant to ICANN's Bylaws and to the extent permitted by applicable law.

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## Review

33. **Review of Governance Guidelines.** The policies and practices memorialized in these Guidelines have developed over a period of years. The Board expects to review these Guidelines periodically, as appropriate. Such a review should generally include an assessment of the Board's compliance with these Guidelines, as well as identification of areas in which the Board could improve its performance.

Deleted: at least every two years



Preserving and enhancing the operational stability, reliability, security and global interoperability of the Internet.

Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

Seeking and supporting broad, informed participation reflecting the functional, geographic and cultural diversity of the Internet at all levels of policy development and decision-making.

Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

# Conflicts of Interest Policy

(Draft as of April 2018)

## ARTICLE I -- PURPOSE AND ADMINISTRATION

Section 1.1. Internet Corporation for Assigned Names and Numbers (ICANN) is committed to the highest levels of integrity. Covered Persons are expected to conduct their relationships with each other, ICANN and outside organizations with objectivity and honesty. Covered Persons are obligated to disclose ethical, legal, financial and other Conflicts of Interest involving ICANN and remove themselves from a position of decision-making authority with respect to any Conflict of Interest involving ICANN. The purpose of this Board Conflicts of Interest Policy (COI Policy) is to prevent any Conflict of Interest or the appearance of a Conflict of Interest from affecting any decision-making involving ICANN, to ensure that the deliberations and decisions of ICANN are made for the benefit of the Internet community, as a whole, and to protect ICANN's interests when ICANN is contemplating entering into a transaction, contract or arrangement or approving a policy, program or other matter that might benefit the personal interests of a Covered Person.

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Section 1.2. A Covered Person may not use his or her position with respect to ICANN, or confidential corporate information obtained by him or her relating to ICANN, in order to achieve a financial or other benefit for himself or herself or for a third person, including another nonprofit or charitable organization.

Section 1.3. This COI Policy is intended to supplement but not to replace any applicable laws governing conflicts of interest applicable to ICANN or a Covered Person.

Section 1.4. ICANN will encourage Supporting Organizations and Advisory Committees and other ICANN-related bodies, as appropriate, to consider implementing the principles and practices of this COI Policy as relevant.

Section 1.5. The Board Governance Committee (together with any subcommittee thereof established by the Board, the Committee) shall administer and monitor compliance with this COI Policy in accordance with the terms contained herein.

Section 1.6. Certain capitalized terms used in this COI Policy shall have the meanings set forth in Article VII of this COI Policy.

## ARTICLE II -- PROCEDURES REGARDING CONFLICTS OF INTEREST

Section 2.1. Duty to Disclose.

(a) In connection with any proposed transaction, contract, arrangement, policy, program or other matter being considered by ICANN, a Covered Person shall promptly disclose the existence of any Potential Direct Conflict that may give rise to a Conflict of Interest with respect to the proposed transaction, contract, arrangement, policy, program or other matter. Such disclosure shall be made to the Office of the General Counsel setting forth, in writing, all relevant facts relating to the Potential Direct Conflict. When in doubt, Covered Persons shall disclose matters as Potential Direct Conflicts.

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(b) Potential Perceived Conflicts can be seriously damaging to the multi-stakeholder community's confidence in ICANN. A Covered Person shall promptly disclose the existence of any Potential Perceived Conflict, which shall be treated as equivalent to a Potential Direct Conflict until such time as the doubt is removed and the matter is determined after investigation of all the relevant facts in accordance with this COI Policy. When in doubt, Covered Persons shall disclose matters as Potential Perceived Conflicts and disclose all relevant facts relating to the Potential Perceived Conflict to the Office of the General Counsel.

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(c) If any Covered Person has reason to believe that another Covered Person has a Potential Conflict, the Covered Person with such belief shall inform the Office of the General Counsel, including disclosing all relevant facts relating thereto.

(d) The Interested Person shall provide the Office of the General Counsel with an updated Statement (as provided for in Article V below) at the time any disclosure is made pursuant to this Section 2.1. The disclosure to the Office of the General Counsel of a Potential Conflict shall be made promptly and pursuant to such procedures as the Board or the Committee may establish from time to time.

#### Section 2.2. Determining Whether a Conflict of Interest Exists.

(a) After disclosure of a Potential Conflict by an Interested Person, the Office of the General Counsel will promptly inform the Committee of the Potential Conflict and provide the Committee with all information provided by the Interested Person related thereto. At the discretion of the Disinterested members of the Committee, the Interested Person may present further information regarding, or otherwise discuss with such members, the Potential Conflict.

(b) Thereafter, in the absence of the Interested Person, the Disinterested members of the Committee shall determine whether or not the circumstances disclosed by the Interested Person regarding the Potential Conflict constitute a Conflict of Interest, and, subject to a contrary finding by a majority of the Disinterested Directors, the determination by Disinterested members of the Committee in this regard is conclusive and may not be challenged by the Interested Person. Such determination shall be recorded pursuant to Section 3.1 hereof. If the Interested Person is a Director or Board Liaison, such determination shall be subject to ratification by, and reported to, the Disinterested Directors at the next Board meeting and prior to the Disinterested Directors approving or adopting, as applicable, the transaction, contract, arrangement, policy, program or other matter giving rise to such Potential Conflict.

#### Section 2.3. Procedures for Addressing a Conflict of Interest.

(a) If the Disinterested members of the Committee determine that a Conflict of Interest exists, the Conflicted Person may make a presentation to the Disinterested members of the Committee regarding the Conflict of Interest. After any such presentation, subject to Section 2.4(d), the Conflicted Person shall leave the meeting and shall not be present during any discussion of the Conflict of Interest.

(b) The Chair of the Committee (if Disinterested) or a majority of the Disinterested members of the Committee, shall, if appropriate, appoint a Disinterested person or committee to investigate alternatives or modifications, as applicable, to the proposed transaction, contract, arrangement, policy, program or other matter. If the Conflicted Person is a Director or Board Liaison, the findings shall be reported to the Disinterested Directors at the next Board meeting and prior to the Disinterested Directors approving or adopting, as applicable, the transaction, contract, arrangement, policy, program or other matter giving rise to such Conflict of Interest.

(c) After investigating the proposed transaction, contract, arrangement, policy, program or other matter, including the findings of any person or committee appointed pursuant to Section 2.3(b), the Disinterested members of the Committee shall determine whether ICANN can obtain with reasonable efforts a more advantageous transaction, contract, arrangement, policy, program or other matter in a manner that would not give rise to or would alleviate or mitigate a Conflict of Interest. If the Conflicted Person is a Director or Board Liaison, such determination shall be reported to the Disinterested Directors at the next Board meeting and prior to the Disinterested Directors approving or adopting, as applicable, the transaction, contract, arrangement, policy, program or other matter giving rise to such Conflict of Interest.

(d) If a more advantageous transaction, contract, arrangement, policy, program or other matter is not reasonably available to ICANN under circumstances not producing a Conflict of Interest, or the transaction, contract, arrangement, policy, program or other matter cannot be modified to alleviate or mitigate a Conflict of Interest, the Disinterested members of the Committee, and where the Conflicted Person is a Director or Board Liaison, the Disinterested Directors shall determine by a majority vote of the applicable Disinterested Directors whether the transaction, contract, arrangement, policy, program or other matter creating the Conflict of Interest is in best interests of the Internet community, as a whole. In conformity with those determinations, the Disinterested members of the Committee or Disinterested Directors, as applicable, shall make its decision as to whether ICANN should enter into the transaction, contract or arrangement or approve the policy, program or other matter.

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#### Section 2.4. Duty to Abstain.

(a) After disclosing the existence of a Potential Conflict, Interested Persons shall refrain from using their personal influence (either at or outside a Board or Committee meeting) to influence ICANN's handling of the transaction, contract, arrangement, policy, program or other matter.

(b) No Director may vote on, and each Director must abstain from voting on, any matter in which the Director has a Conflict of Interest, except that a Director need not abstain from, and may vote on, whether to accept or to reject a recommendation to the Board by an Independent Valuation Expert contained in a Reasoned Written Opinion from such Independent Valuation Expert regarding a Compensation arrangement for services provided by the Director to ICANN in the Director's capacity as a member of the Board.

(c) In the event of such an abstention, the abstaining Director shall state the reason for the abstention, which shall be recorded pursuant to Section 3.1.

(d) Except as otherwise provided in Section 2.4(b) above regarding a compensation arrangement for services provided by the Director to ICANN in the Director's capacity as member of the Board, no Director may participate in Board committee or Board deliberations on any transaction, contract, arrangement, policy, program or other matter in which he or she has a Conflict of Interest without first disclosing the Conflict of Interest (and otherwise complying with the requirements of this COI Policy) and until a majority of Disinterested members of the Committee or a majority of the Disinterested Directors agree on whether and in what manner the Conflicted Person may participate.

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Section 2.5. Violations of the Conflicts of Interest Policy.

(a) If the Disinterested members of the Committee have reasonable cause to believe a Covered Person has failed to disclose a Potential Conflict, the Committee shall inform the Covered Person and the Office of the General Counsel, and initiate the procedures described in Sections 2.1, 2.2 and 2.3.

(b) If the Disinterested members of the Committee determine that a Director or Board Liaison has intentionally failed to disclose a Potential Conflict, the Disinterested members of the Committee shall make recommendations to the Disinterested Directors for corrective action. The Disinterested Directors shall review the Disinterested members of the Committee's recommendation and shall take such corrective action as they deem appropriate, including, but not limited to, removal of a non-disclosing Director or Board Liaison in accordance with ICANN's Bylaws and applicable law.

**ARTICLE III -- RECORDS OF PROCEEDINGS**

Section 3.1. The written or electronic records of the Board and the Committee relating to Conflicts of Interest shall contain:

(i) The names of Covered Persons who disclosed or otherwise were found to have a Potential Conflict in connection with a proposed contract, arrangement, policy, program or other matter;

(ii) The nature of the Potential Conflict;

(iii) Any action taken to determine whether a Conflict of Interest was present;

(iv) The Board's or the Committee's, as applicable, decision as to whether a Conflict of Interest in fact existed;

(v) The names of the persons who were present for discussions and votes relating to the transaction, contract, arrangement, policy, program or other matter;

(vi) The content of the discussion, including any alternatives to the proposed transaction, contract, arrangement, policy, program or other matter; and

(vii) A record of any votes taken in connection therewith.

**ARTICLE IV -- COMPENSATION**

Section 4.1. Except to the extent permitted under Section 2.4(b), a Director who receives Compensation, directly or indirectly, from ICANN for services may not vote on matters pertaining to the Director's Compensation.

Section 4.2. A Director may not vote on matters pertaining to Compensation received, directly or indirectly, from ICANN by a member of the Director's Family or by an individual with whom a Director has a close personal relationship, including, but not limited to, any relationship other than kinship, spousal or spousal equivalent that establishes a significant personal bond between the Director and such other individual that in the judgment of the Committee could impair the Director's ability to act fairly and independently and in a manner that furthers, or is not opposed to, the best interests of ICANN.

Section 4.3. No Covered Person who receives Compensation, directly or indirectly, from ICANN, either individually or collectively, is prohibited from providing information to the Board or to any Committee regarding the Covered Person's Compensation.

## ARTICLE V -- ANNUAL STATEMENTS

Section 5.1. Each Covered Person shall annually, or promptly upon becoming a Covered Person, sign a Statement which affirms such Covered Person: (i) has received a copy of the COI Policy; (ii) has read and understands the COI Policy; (iii) has agreed to comply with the COI Policy; and (iv) understands ICANN is a tax-exempt organization described in § 501(c)(3) of the Internal Revenue Code and that in order to maintain its federal tax exemption, ICANN must engage primarily in activities which accomplish one or more of ICANN's tax-exempt purposes.

Section 5.2. On an annual basis, all Covered Persons shall disclose on their Statement a list of all organizations in which he or she has a Financial Interest or Duality of Interest.

Section 5.3. On an annual basis, the Committee shall review the Statements of the Covered Persons to determine whether any Covered Person has a Conflict or Conflicts of Interest that is, or in the aggregate are, so pervasive that the Conflicted Person should no longer serve in his or her respective role. If the Committee makes such a determination and the Conflicted Person is a Director or Liaison, the findings shall be reported to the Disinterested Directors at the next Board meeting.

## ARTICLE VI -- PERIODIC REVIEWS

Section 6.1. To ensure ICANN operates with the highest levels of integrity and in a manner consistent with its tax-exempt purposes and does not engage in activities that could jeopardize its tax-exempt status, the Board shall ensure that the Office of the General Counsel and Finance Department shall conduct periodic reviews of its purposes and activities.<sup>1</sup>

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Section 6.2. These periodic reviews shall, at a minimum, include the following subjects:

- (i) Whether activities carried on by ICANN are consistent with and in furtherance of one or more of ICANN's tax-exempt purposes;
- (ii) Whether ICANN follows policies and procedures reasonably calculated to prevent private Inurement more than incidental private benefit, excess benefit transactions, substantial lobbying, and participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office;
- (iii) Whether compensation arrangements and benefits are reasonable, are based on appropriate data as to comparability, and are the result of arm's length bargaining; and
- (iv) Whether partnerships, joint ventures, and arrangements with organizations that provide management personnel or management services conform to ICANN's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further tax-exempt purposes, and do not result in private Inurement more than incidental private benefit, or in an excess benefit transaction.

<sup>1</sup> Section 6.3 requires the Board to be responsible for ensuring that these reviews are conducted.

Section 6.3. When conducting the periodic reviews, ICANN may, but need not, use outside experts and/or advisors. If outside experts and/or advisors are used, their use shall not relieve the Board of its responsibility for ensuring periodic reviews are conducted in the manner prescribed in this Article.

## ARTICLE VII -- DEFINITIONS

Section 7.1. As used in this COI Policy, the following terms shall have the meanings set forth below.

- (i) "Advisory Committees" means the Governmental Advisory Committee, the At-Large Advisory Committee, the Security and Stability Advisory Committee and the Root Server System Advisory Committee.
- (ii) "Board" means the ICANN Board of Directors.
- (iii) "Board Governance Committee" means the Board Governance Committee of the Board.
- (iv) "Board Liaison" shall mean those liaisons to the Board appointed in accordance with ICANN's Bylaws.
- (v) "Compensation" includes direct and indirect remuneration as well as gifts or favors that are material in nature or amount. Compensation does not include reimbursement of properly documented travel and other appropriate business expenses.
- (vi) A "Conflict" or "Conflict of Interest" arises when the Board or the Committee, as applicable, following the procedures set forth in Articles II and III of this COI Policy, determines that a Covered Person has disclosed a Potential Conflict that may in the judgment of a majority of the Disinterested Directors or Disinterested members of the Board or the Committee, as applicable, adversely impact the Covered Person's ability to act fairly and independently and in a manner that furthers, or is not opposed to, the best interests of ICANN.
- (vii) "Conflicted Person" means a Covered Person who has been determined by the Board or the Committee to have a Conflict of Interest.
- (viii) "Covered Person" shall mean an Officer, Director, Board Liaison or Key Employee of ICANN.
- (ix) A "Director" is any voting member of the Board.
- (x) "Disinterested" means not having a Potential Conflict with respect to a transaction, contract, arrangement, policy, program or other matter being considered by ICANN.
- (xi) "Domestic Partner" shall mean an individual who resides at the same residence as the Covered Person as his or her spousal equivalent.
- (xii) A "Duality of Interest" arises when, with respect to a transaction, contract, arrangement, policy, program or other matter, a Covered Person or a member of a Covered Person's Family has a fiduciary relationship with another party to a proposed transaction, contract or arrangement which gives rise to a circumstance in which the fiduciary duties of the Covered Person to ICANN and the fiduciary duties of the Covered Person, or the fiduciary duties of the Family member of the Covered Person, to the other party may be in conflict. A Duality of Interest does not constitute a Conflict of Interest if ICANN and all other parties to the transaction, contract or arrangement being in possession of all material facts, waive the conflict in writing.
- (xiii) The "Family" of any Covered Person shall include the Covered Person's spouse; Domestic Partner; siblings and their spouses or Domestic Partners; ancestors and their spouses or Domestic Partners; and descendants and their spouses or Domestic Partners. Family shall also include anyone (other than a domestic employee or service provider) who shares the Covered Person's home.
- (xiv) A "Financial Interest" exists whenever a Covered Person has or is engaged in discussions to have, directly or indirectly, through business, investment, or Family: (a) an ownership or investment interest in any entity with which ICANN has a transaction, contract, arrangement, policy, program or other matter; (b) a Compensation arrangement with any entity or individual with which ICANN has a transaction, contract, arrangement, policy, program or other matter; and (c) a potential

ownership or investment interest in, or Compensation arrangement with, any entity or individual with which ICANN is negotiating a transaction, contract, arrangement, policy, program or other matter. As used herein, "transactions, contracts, and arrangements" include grants or other donations as well as business arrangements, approvals or endorsements. Additionally, as used herein "policies, programs or other matters" include, but are not limited to, the application for or the registration of top level domains. A Financial Interest is a Potential Conflict but is not necessarily a Conflict of Interest. A Financial Interest does not become a Conflict of Interest until the Board or the Committee, following the procedures set forth in Articles II and III of this COI Policy, determines that the Financial Interest constitutes a Conflict of Interest.

(xv) An "Independent Valuation Expert" means a Person retained by ICANN to value compensation arrangements that: (a) holds itself out to the public as a compensation consultant; (b) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for Persons other than ICANN; (c) is qualified to make valuations of the type of services involved in any engagement by and for ICANN; (d) issues to ICANN a Reasoned Written Opinion regarding a particular compensation arrangement; and (e) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (a) through (d) of this definition.

(xvi) An "Interested Person" is a Covered Person who has a Potential Conflict with respect to a particular transaction, contract, arrangement, policy, program or other matter under consideration by ICANN.

(xvii) "Internal Revenue Code" shall mean the United States Internal Revenue Code of 1986, as amended, or any future revenue statute replacing the 1986 Code.

(xviii) "Inurement," as used in this COI Policy, shall mean: (a) a transaction in which ICANN provides an economic benefit, directly or indirectly, to or for the use of any Covered Person where the value of that economic benefit exceeds the value of the consideration (including the performance of services) that ICANN receives in exchange; or (b) any transaction or arrangement by or through which a Covered Person receives a direct or indirect distribution of ICANN's net earnings (other than payment of fair market value for property or the right to use property and reasonable compensation for services).

(xix) A "Key Employee" is an employee of ICANN designated as a member of the executive management team of ICANN, but who is not an Officer or Director.

(xx) An "Officer" is an individual holding a position designated as an Officer by ICANN's Bylaws or by resolution of the Board and includes, without limitation, the President of ICANN.

(xxi) A "Person" includes an individual, corporation, limited liability company, partnership, trust, unincorporated association or other entity.

(xxii) A "Potential Conflict" means either a Potential Direct Conflict or a Potential Perceived Conflict.

(xxiii) A "Potential Direct Conflict" means any one or more of the following: (a) a direct or indirect Financial Interest in a transaction, contract or arrangement being considered by ICANN, by a Covered Person or a member of a Covered Person's Family; (b) a Duality of Interest by a Covered Person or a member of a Covered Person's Family with respect to another party to a transaction, contract or arrangement being considered by ICANN that has not been waived in writing by all parties to the transaction, contract or arrangement; or (c) a close personal relationship between the Covered Person, or a member of a Covered Person's Family, with an individual who is, directly or indirectly through business, investment, or Family, a party to a transaction, contract or arrangement being considered by ICANN.

(xxiv) A "Potential Perceived Conflict" exists when a reasonable person, knowing the relevant facts, could conclude that the Covered Person's private interests could adversely impact the Covered Person's ability to act fairly and independently and in a manner that furthers, or is not opposed to, the best interests of ICANN.

(xxv) "Regulations" means treasury regulations promulgated under the Internal Revenue Code.

(xxvi) "Reasoned Written Opinion" means a written opinion of a valuation expert who meets the requirements of Section 7.1(xv)(a) through (d) of this COI Policy. To be reasoned, the opinion must be based upon a full disclosure by ICANN to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, the opinion

must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

(xxvii) "Statement" means the annual statement required by Article V hereof.

(xxviii) "Supporting Organizations" mean the Address Supporting Organization, the Generic Names Supporting Organization and the Country Codes Name Supporting Organization.

Section 7.2. Where terms used in this COI Policy, such as Reasonable Compensation (which shall have the meaning set forth in § 53.4958-4(b)(1)(ii) of the Regulations), have a particular meaning under the Internal Revenue Code and/or any Regulations issued thereunder, this COI Policy shall be construed to incorporate that meaning as the context requires.

Section 7.3. All other terms used in this COI Policy shall be given their ordinary, everyday meaning.



## REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.2a

**TITLE:** **Consideration of Reconsideration Request 18-1**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 18-1.

Attachment A is [Reconsideration Request 18-1](#), submitted on 10 March 2018.

Attachment B is the [Ombudsman Action on Request 18-1](#), dated 17 April 2018.

Attachment C is the [BAMC Recommendation on Request 18-1](#), issued 5 June 2018.

Attachment D is the Requestor's [Rebuttal](#) to the BAMC Recommendation on Request 18-1, submitted on 20 June 2018.

### **Background Links**

The following links are relevant to the Board's consideration of Reconsideration Request 18-1.

Exhibits 1 to 22 submitted in support of Request 18-1 are available at

<https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-exhibits-1-redacted-10mar18-en.pdf>.

Exhibits 23 to 29 submitted in support of the Requestor's Rebuttal to the BAMC Recommendation on Request 18-1 are available at

<https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-exhibits-23-20jun18-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 10 July 2018

Email: amy.stathos@icann.org

## **DotMusic Limited Reconsideration Request (“RR”)**

March 10, 2018

### **1. Requestor Information**

Requestors:

**Name:** DotMusic Limited

Contact Information Redacted

**Address:**

**Email:** Constantinos Roussos Contact Information Redacted

Requestor is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, 1900 K Street, NW Washington, DC 20006-1110

Contact Information Redacted

**Email:**

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

DotMusic Limited (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180110-1, dated February 10, 2018 (the “DIDP Response”), which denied the disclosure of certain documents requested pursuant to ICANN’s DIDP.

On January 10, 2018, Requestor sought disclosure of documentary information relating to ICANN's Board Governance Committee's (the "BGC") review of the Community Priority Evaluation ("CPE") process through an independent review by FTI Consulting, Inc. ("FTI") (the "DIDP Request").<sup>1</sup> Specifically, the Requestor submitted nineteen (19) requests:

1. All "[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)" that were provided to FTI by ICANN as part of its independent review;
2. All "[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)" that were provided to FTI by ICANN as part of its independent review;
3. The "list of search terms" provided to ICANN by FTI "to ensure the comprehensive collection of relevant materials;"
4. All "100,701 emails, including attachments, in native format" provided to FTI by ICANN in response to FTI's request;
5. All emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;"
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"

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<sup>1</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the “CPE Provider’s working papers associated with” DotMusic’s CPE;
12. “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”
13. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”
14. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”
15. FTI’s investigative plan used during its independent review;
16. FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”
17. All communications between ICANN and FTI regarding FTI’s independent review;
18. All communications between ICANN and the CPE Provider regarding FTI’s independent review; and
19. All communications between FTI and the CPE Provider regarding FTI’s independent review.<sup>2</sup>

In its Response, ICANN refused to disclose any of the requested documents.<sup>3</sup>

ICANN argued that it appropriately determined that “certain documents are not appropriate for disclosure” pursuant to its Nondisclosure Conditions, and it can therefore deny the document

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<sup>2</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), pp. 3-6, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>3</sup> See Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

request “without contravening its commitment to transparency.”<sup>4</sup> According to ICANN, a significant number of Nondisclosure Conditions apply to the DIDP Request. For instance, ICANN claimed that, because its outside counsel retained FTI, “FTI’s draft and working materials are protected by the attorney-client privilege under California law.”<sup>5</sup> ICANN further argued that the requests include confidential information from the CPE Provider that cannot be disclosed because “the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations.”<sup>6</sup> Under its Nondisclosure Conditions, then, ICANN determined that it was not obligated to disclose documents requested in the DIDP Request.

Under the DIDP, however, ICANN can disclose documents covered by the Nondisclosure Conditions under certain circumstances. If ICANN determines that “the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure,”<sup>7</sup> then it can publish the documents. ICANN did not make such a determination, instead finding that:

ICANN organization’s internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>8</sup>

ICANN organization’s communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>9</sup>

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<sup>4</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>5</sup> *Id.*, p. 11. ICANN also argued that, “even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization’s outside counsel’s direction, and FTI’s draft and working materials, ‘might prejudice an[] internal . . . investigation’—that is, the CPE Process Review.” *Id.*

<sup>6</sup> *Id.*, p. 9.

<sup>7</sup> *Id.*, p. 7.

<sup>8</sup> *Id.*, p. 10.

<sup>9</sup> *Id.*, p. 11.

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]<sup>10</sup>

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]<sup>11</sup>

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]<sup>12</sup>

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]<sup>13</sup>

ICANN thus refused to disclose most of the requested documents to the Requestor.

In addition, ICANN asserted that it could not disclose Requests No. 10 and 16, FTI's engagement letter with ICANN and FTI's follow-up communications with the CPE Provider, respectively, because they do "not exist."<sup>14</sup>

**4. Date of action/inaction:**

ICANN acted on February 9, 2018 by issuing its Response to the DIDP Request.<sup>15</sup>

**5. On what date did you become aware of action or that action would not be taken?**

The Requestor became aware of the action on February 9, 2018, when the DIDP Response was received.

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<sup>10</sup> *Id.*, p. 13.

<sup>11</sup> *Id.*, p. 15.

<sup>12</sup> *Id.*, p. 18.

<sup>13</sup> *Id.*, p. 19.

<sup>14</sup> *Id.*, p. 16, 19. ICANN explained that "FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist." *Id.*, p. 16.

<sup>15</sup> Requestor received the DIDP Response on February 9, 2018, even though the DIDP Response is dated February 10, 2018. *See* Exhibit 3, Email to A. Ali from ICANN (Feb. 9, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>

**6. Describe how you believe you are materially affected by the action or inaction:**

Requestor is materially affected by ICANN's refusal to disclose certain information concerning FTI's review of the CPE process because ICANN intends to rely on the FTI's three reports (the "FTI Reports") to make a decision on Requestor's Reconsideration Request 16-5 ("Request 16-5"). ICANN's reliance on the procedurally and substantively deficient reports will directly affect Requestor's rights regarding its community application for the .MUSIC gTLD, which is the focus of Request 16-5. However, Requestor cannot fully analyze the FTI Reports because ICANN refuses to disclose their underlying documents. ICANN's decision therefore both prevents Requestor from properly and fairly contesting the results and implications of a facially deficient "independent" review and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

ICANN is required to "operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets."<sup>16</sup> It has failed to do so.

ICANN has not complied within international law and conventions in violation of its Bylaws. There is an "an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems."<sup>17</sup> This principle is violated "when a decision is based

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<sup>16</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>17</sup> Exhibit 5, Charles T. Kotuby Jr., "General Principles of Law, International Due Process, and the Modern Role of Private International Law" 23 *Duke J. of Comparative and Int'l L.* 411, 422 (2013).

upon evidence and argumentation that a party has been unable to address.”<sup>18</sup> The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.<sup>19</sup> While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,”<sup>20</sup> it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-5—the FTI Reports.

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>21</sup> These standards require that ICANN “employ[ ] open and transparent policy development mechanisms;”<sup>22</sup> “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>23</sup> and “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>24</sup> ICANN’s DIDP is especially important to ICANN’s commitment to transparency. As a “principle element of ICANN’s

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<sup>18</sup> Exhibit 6, Charles T. Kotuby and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 179 (Mar. 15, 2017).

<sup>19</sup> Exhibit 7, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. ... While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

<sup>20</sup> Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>21</sup> *See* Exhibit 4, ICANN Bylaws (July 22, 2017), Arts. 1, 3-4, <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>22</sup> *Id.*, Art. 3, § 3.1.

<sup>23</sup> *Id.*, Art. 1, § 1.2(v).

<sup>24</sup> *Id.*, Art. 1, § 1.2(vi).



approach to transparency and information disclosure,”<sup>25</sup> the DIDP “is intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>26</sup>

ICANN has violated these Bylaws, and the commitments contained therein, by refusing to disclose the requested documents. ICANN’s decision raises questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Reconsideration Request 16-5.<sup>27</sup>

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising how ICANN maintains that it can instruct FTI to undertake such a review, and accept the conclusions of that review, without disclosing the materials that informed FTI’s findings. If ICANN fails to disclose the requested documents, it will underscore the serious questions that have been raised about the impartiality, independent legitimacy, and credibility of FTI’s investigation, which already have been raised by Requestor.<sup>28</sup> Such an action would harm the global public interest, Requestor, and the global music community that has supported Requestor’s Application.

ICANN cannot claim that there is no legitimate public interest in disclosing the requested documents given FTI’s conclusions, which are contrary to the findings of other panels and experts.

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<sup>25</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>26</sup> *Id.*

<sup>27</sup> See Exhibit 10, Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>28</sup> Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

This is clearly shown through FTI’s conclusion that it found no evidence that ICANN influenced the CPE Provider.<sup>29</sup> In clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.<sup>30</sup> Without the underlying documents, there is no tenable way to analyze whether ICANN unduly influenced the CPE Provider. The documents are given even greater import because ICANN argued that it did not disclose certain documents because “the CPE Provider has not agreed . . . and has threatened litigation.”<sup>31</sup> In light of the Dot Registry IRP Declaration, a reasonable person would conclude that the CPE Provider’s litigation threats suggests that there were serious and improper conduct during the CPE. Without the requested documents, however, there is no means to determine whether such conduct occurred.

To make matters worse, ICANN admits that “ICANN organization’s outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI’s draft and working materials are protected by the attorney-client privilege under California law.”<sup>32</sup> Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.

Given the above considerations, this is clearly a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested

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<sup>29</sup> Exhibit 11, FTI, Scope 1 Report (Dec. 13, 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>30</sup> See Exhibit 12, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>31</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 9 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>32</sup> *Id.*, p. 11.

disclosure.”<sup>33</sup> ICANN has not disclosed any “compelling” reason that outweighs the public interest in disclosure. In fact, rejecting full disclosure of the requested items undermines both the integrity and the scope of the FTI investigation that the ICANN Board and the BAMC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s actions materially affects the global music community that has supported the Requestor’s application. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN’s identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

An opaque ICANN materially damages its credibility, accountability, and trustworthiness. Moreover, an ICANN that lacks transparency undermines its due diligence and decision-making process in matters that relate to the global public interest and determinations that could materially

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<sup>33</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en> (“Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”).

harm affected parties. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that FTI used to review the CPE process, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.<sup>34</sup> This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the music community members, which have supported Requestor's application for .MUSIC, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

#### **8. Detail of Staff/Board Action/Inaction – Required Information**

The Requestor filed a community-based Top-Level Domain ("gTLD") application for the ".MUSIC" string. However, the CPE Provider recommended that ICANN reject the Requestor's community application.<sup>35</sup> Requestor subsequently made various submissions, including independent expert reports supporting their community application, showing that the CPE Provider's decision is fundamentally erroneous.<sup>36</sup> These submissions explain how the CPE Provider disparately treated Requestor's application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community applications, failing to follow its own guidelines, discriminatorily treating the application, making several factual errors, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria.

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<sup>34</sup> Exhibit 13, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

<sup>35</sup> Exhibit 14, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>36</sup> Exhibit 15, "Request 16-5: DotMusic Limited" ICANN (last visited Mar. 8, 2018), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

ICANN began its own review of the CPE process in late 2016, assigning the task to the BGC.<sup>37</sup> It did not disclose any substantive information about this review to the Requestor or other participants in the CPE process. However, since the review concerns an examination of the CPE process, it was apparent to the Requestor early on that the review will directly affect the outcome of Request 16-5. Thus, on May 5, 2017, the Requestor filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “First DIDP Request”) in an attempt to learn more about the review.<sup>38</sup> In submitting this request, the Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes”<sup>39</sup> and disclose the requested documents. ICANN failed to do so when it denied certain requests made in the First DIDP Request on June 4, 2017.<sup>40</sup>

After Requestor submitted its First DIDP Request, ICANN finally disclosed some additional information regarding the CPE review. It announced that FTI was reviewing the CPE process, and collecting information and materials from ICANN and the EIU regarding the process.<sup>41</sup> In response to the information disclosed about FTI, on July 25, 2017, the Requestor jointly filed another DIDP Request on 10 June 2017 (the “Second DIDP Request”) to learn about

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<sup>37</sup> Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>38</sup> Exhibit 17, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>39</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>40</sup> Exhibit 18, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

<sup>41</sup> Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

FTI and the purview of its review.<sup>42</sup> This request was also denied in violation of ICANN's commitment to transparency.<sup>43</sup>

Requestor finally learned substantive information about FTI's review on December 13, 2017, when ICANN decided to publish the results of FTI's work: the FTI Reports.<sup>44</sup> Upon review of the FTI Reports, Requestor found that they contained significant problems both in the substance of the reports and the procedures that FTI used to in its review.<sup>45</sup> For instance, FTI did not re-evaluate the CPE applications, examine the substance of the reference material cited in its own reports, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants. As FTI's review is intended to "assist in the CPE review,"<sup>46</sup> Requestor sought to learn about FTI and its flawed reports on the CPE process, which makes several conclusions that may significantly impact Request 16-5.<sup>47</sup> Therefore, Requestor submitted to ICANN the DIDP Request.

ICANN first responded to the DIDP Request on February 9, 2018.<sup>48</sup> In its Response, ICANN determined that the Nondisclosure Conditions applied to most of the requests and that the public interest did not warrant disclosing the following documents:

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<sup>42</sup> Exhibit 20, DotMusic Limited's Second DIDP Request (Jun. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>43</sup> Exhibit 21, ICANN's Response to DotMusic Limited's DIDP Request (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

<sup>44</sup> Exhibit 22, "ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process" ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>45</sup> See Exhibit 8, Email from DotMusic to ICANN attaching the "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>46</sup> Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>47</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>48</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>49</sup>

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>50</sup>

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]<sup>51</sup>

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]<sup>52</sup>

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]<sup>53</sup>

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]<sup>54</sup>

In relation to Item 10, ICANN stated that it cannot share the engagement letter between FTI and ICANN because:

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.<sup>55</sup>

In relation to Item 16, ICANN states that there is no written follow-up communication from the FTI to the CPE Provider and as such, "no such documents exist:"

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.<sup>56</sup>

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<sup>49</sup> *Id.*, p. 10.

<sup>50</sup> *Id.*, p. 11.

<sup>51</sup> *Id.*, p. 13.

<sup>52</sup> *Id.*, p. 15.

<sup>53</sup> *Id.*, p. 18.

<sup>54</sup> *Id.*, p. 19.

<sup>55</sup> *Id.*, p. 16.

<sup>56</sup> *Id.*, p. 19.

ICANN, in providing such responses to the DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. Requestor thus submits this Reconsideration Request in response. Disclosure of such information to the gTLD applicant is necessary to ensure that FTI's "independent" review remains a fair, transparent, and independent process.

**9. What are you asking ICANN to do now?**

Requestor asks ICANN to disclose all items and documents requested in the DIDP Request.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requestor is a community applicant for the .MUSIC string and the organization that submitted the DIDP Request to ICANN. Requestor is thus materially affected by ICANN's decision to deny the DIDP Request. Further, the global music community that is supporting the .MUSIC community application is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No. The Reconsideration Request is filed on behalf of DotMusic Limited.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

Not applicable.



**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

March 10, 2018

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Date

**Subject:** Re: [Reconsideration Request] Reconsideration Request 18-1  
**Date:** Tuesday, April 17, 2018 at 7:33:32 AM Pacific Daylight Time  
**From:** Herb Waye (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman, Dave Marglin

Reconsideration Request 18-1

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-1.

Best regards,

Herb Waye  
ICANN Ombudsman

[https://www.icann.org/ombudsman\[icann.org\]](https://www.icann.org/ombudsman[icann.org])

[https://www.facebook.com/ICANNombudsman\[facebook.com\]](https://www.facebook.com/ICANNombudsman[facebook.com])

Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

[https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org])

Community Anti-Harassment Policy

[https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en\[icann.org\]](https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org])

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>

**Date:** Monday, April 16, 2018 at 12:41 PM

**To:** Herb Waye <herb.waye@icann.org>

**Cc:** Reconsideration <Reconsideration@icann.org>

**Subject:** Reconsideration Request 18-1

Dear Herb,

ICANN recently received the attached reconsideration request (Request 18-1), which was submitted on 10 March 2018 by DotMusic Limited seeking reconsideration of ICANN's response to the Requestor's DIDP regarding the Community Priority Evaluation Process Review. Exhibits 1 through 22 in support of Request 18-1 are available at [https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-exhibits-1-redacted-10mar18-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-exhibits-1-redacted-10mar18-en.pdf[icann.org]).

The Board Accountability Mechanisms Committee (BAMC) has determined that Request 18-1 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.

Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 18-1 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 18-1 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 17-2.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-1  
5 JUNE 2018**

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The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (2018 DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .MUSIC (Application or DotMusic Application), which was placed in a contention set with other .MUSIC applications.<sup>3</sup> The Requestor participated in CPE, but did not prevail. The Requestor has challenged the CPE Provider's evaluation of its Application in Reconsideration Request 16-5, which is pending.<sup>4</sup>

While Request 16-5 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>5</sup> The Board Governance Committee (BGC) thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the

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<sup>1</sup> Request 18-1, § 3, at Pg. 1-5, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

<sup>2</sup> *Id.*, § 6, at Pg. 6-10.

<sup>3</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>.

<sup>4</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>5</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

subject of certain pending Reconsideration Requests relating to the CPE process.<sup>6</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-5, would be placed on hold until the CPE Process Review was completed.<sup>7</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>8</sup>

On 10 January 2018, the Requestor submitted the 2018 DIDP Request. The Requestor sought 19 categories of documents and information relating to the CPE Process Review.<sup>9</sup> On 9 February 2018, ICANN org responded to the 2018 DIDP Request (2018 DIDP Response). ICANN provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the 2018 DIDP Response. Notwithstanding the Nondisclosure Conditions, ICANN org "also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>10</sup> Additionally, in response to two of the requested items, ICANN org explained that the requested documentary information did not exist.<sup>11</sup>

On 10 March 2018, the Requestor filed the instant Reconsideration Request 18-1 (Request 18-1), which challenges certain portions of the 2018 DIDP Response. The Requestor

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<sup>6</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>7</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>8</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>9</sup> 2018 DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf>.

<sup>10</sup> Response to DIDP Request No. 20180110-1; Request 18-1 Ex. 2, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>11</sup> *Id.*

claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>12</sup>

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>13</sup>

Pursuant to Article 4, Section 4.2(I) of the Bylaws, ICANN org transmitted Request 18-1 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>14</sup>

The BAMC has considered Request 18-1 and all relevant materials and recommends that the Board deny Request 18-1 because ICANN org adhered to established policies and procedures in its response to the 2018 DIDP Request.

## **II. Facts.**

### **A. The CPE Provider's Evaluation of the DotMusic Application.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited and the Requestor accepted to participate in CPE.<sup>15</sup>

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<sup>12</sup> Request 18-1, § 6, at Pg. 6-10.

<sup>13</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>14</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-1, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-ombudsman-action-17apr18-en.pdf>.

<sup>15</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>; *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

On 10 February 2016, the CPE panel issued a CPE report, concluding that the Application earned 10 out of 16 possible points on the CPE criteria.<sup>16</sup> Because a minimum of 14 points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.<sup>17</sup> On 24 February 2016, the Requestor filed Request 16-5, seeking reconsideration of the CPE determination and approval of the Requestor's community application.<sup>18</sup>

On 29 April 2016, the Requestor submitted a DIDP request seeking documents relating to the CPE Report (2016 DIDP request).<sup>19</sup> On 15 May 2016, ICANN org responded to the 2016 DIDP Request.<sup>20</sup> ICANN org provided links to all the responsive, publicly available documents, furnished an email not previously publicly available, explained that it did not possess documents responsive to several of the requests, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>21</sup> The Requestor thereafter filed Request 16-7, challenging ICANN org's response to the 2016 DIDP Request.<sup>22</sup> On 26 June 2016, the BGC denied Request 16-7.<sup>23</sup>

## **B. The CPE Process Review.**

While Request 16-5 was still pending, ICANN's Board directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally

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<sup>16</sup> *Id.*; see also CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>17</sup> See CPE Report at 1.

<sup>18</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>19</sup> 2016 DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

<sup>20</sup> 2016 DIDP Response, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-request-redacted-30may16-en.pdf>.

<sup>23</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).<sup>24</sup>

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.<sup>25</sup> The BGC determined that, in addition to reviewing the process by which ICANN org interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>26</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the pending Reconsideration Requests relating to the CPE process, including Request 16-5, would be on hold until the CPE Process Review was completed.<sup>27</sup>

On 13 December 2017, ICANN org published the three reports issued in connection with the CPE Process Review.<sup>28</sup>

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the

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<sup>24</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>25</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>26</sup> *Id.*

<sup>27</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>28</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.



BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review (the 2018 Resolutions).<sup>29</sup>

**C. Relevant Prior DIDP Requests from the Requestor Seeking Documents Regarding the CPE Process Review.**

While the CPE Process Review was pending, the Requestor submitted two DIDP Requests seeking documents and information<sup>30</sup> relating to the CPE Process Review.<sup>30</sup> The Requestor subsequently filed two Reconsideration Requests, Requests 17-2 and 17-4, which challenged certain portions of ICANN org’s Responses to those two DIDP Requests.<sup>31</sup> The Board denied both Requests 17-2 and 17-4.<sup>32</sup>

**D. The 2018 DIDP Request.**

On 10 January 2018, the Requestor submitted the 2018 DIDP Request, seeking 19 categories of documents.<sup>33</sup>

On 9 February 2018, ICANN org responded to the 2018 DIDP Request. ICANN org provided links to all responsive, publicly available documents. With respect to those requested materials that were in ICANN org’s possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions. Notwithstanding the Nondisclosure Conditions, ICANN org “also

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<sup>29</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>30</sup> See DIDP Request No. 20170505-1, filed 5 May 2017, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf> (2017 DIDP Request).

<sup>31</sup> Request 17-2, <https://www.icann.org/resources/pages/reconsideration-17-2-dotmusic-request-2017-06-19-en>; Request 17-4, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>. Request 17-4 was filed in conjunction with dotgay LLC.

<sup>32</sup> Board Action Regarding Request 17-2, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.a>; Board Action Regarding Request 17-4, <https://www.icann.org/resources/board-material/resolutions-2017-10-29-en#1.a>.

<sup>33</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf>, (alterations in original) (internal citations omitted).

evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”<sup>34</sup> Additionally, ICANN org explained that the documentary information requested in two of the requested categories did not exist.<sup>35</sup>

On 15 March 2018, the Requestor filed Request 18-1, seeking reconsideration of ICANN org’s determination not to produce all requested documents, which is discussed in detail below.

On 23 March 2018, the Requestor and dotgay LLC submitted a letter to the BAMC concerning the CPE Process Review.<sup>36</sup> Among other things, the Requestor asserted that “[i]f transparency and accountability are indeed the Board’s objectives, then” ICANN org should disclose all of the documents requested in the 2018 DIDP Request.<sup>37</sup> The Requestor asserted that if ICANN org did not agree to all of its conditions, “the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.”<sup>38</sup>

On 5 April 2018, the Requestor reiterated that, “[i]n order to provide ICANN with further substantive comments on the CPE Process Review,” the Requestor “must have” the items it sought in its 23 March 2018 letter, including the documents requested in the 2018 DIDP.<sup>39</sup>

#### **E. Relief Requested.**

The Requestor asks the BAMC to “disclose all items and documents requested in the [2018] DIDP Request.”<sup>40</sup>

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<sup>34</sup> Response to DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>35</sup> *Id.* at Items 10, 16.

<sup>36</sup> 23 March 2018 letter from A. Ali to ICANN Board at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

<sup>37</sup> *Id.* at Pg. 4-5.

<sup>38</sup> *Id.* at Pg. 5.

<sup>39</sup> Attachment 1, 5 April 2018 email from R. Wong to ICANN org.

<sup>40</sup> Request 18-1, § 9, at Pg. 15.

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN org complied with established ICANN policies in responding to the DIDP Request; and
2. Whether ICANN org complied with its Core Values, Mission, and Commitments.<sup>41</sup>

### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

#### **A. Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.<sup>42</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>43</sup> Where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the

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<sup>41</sup> Request 18-1.

<sup>42</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(a), (c), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>43</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(k), (l).

Ombudsman, and provide a recommendation to the Board.<sup>44</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>45</sup>

On 16 April 2018, the BGC determined that Request 18-1 is sufficiently stated and sent Request 18-1 to the Ombudsman for review and consideration.<sup>46</sup> The Ombudsman thereafter recused himself from this matter.<sup>47</sup> Accordingly, the BAMC has reviewed Request 18-1 and all relevant materials, and issues this Recommendation.

## **B. The DIDP.**

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN org's operational activities. In that regard, ICANN org publishes many categories of documents on its website as a matter of course.<sup>48</sup> In addition, the DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already

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<sup>44</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>45</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>46</sup> Ombudsman Action Regarding Request 18-1, Pg. 1-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-ombudsman-action-17apr18-en.pdf>.

<sup>47</sup> *Id.* at Pg. 1.

<sup>48</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

publicly available is made available to the public unless there is a compelling reason for confidentiality.<sup>49</sup>

The DIDP was developed through an open and transparent process involving the broader community. It was the result of an independent review of standards of accountability and transparency within ICANN org, which included extensive public comment and community input.<sup>50</sup>

Neither the DIDP nor ICANN org's Commitments and Core Values supporting transparency and accountability obligate ICANN org to make public every document in ICANN org's possession. The DIDP is limited to requests for *documentary information* already in existence within ICANN org that is not publicly available. Requests for information are not appropriate DIDP requests. Moreover, ICANN org is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>51</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN org adheres to the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests" (DIDP Response Process).<sup>52</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN org's website]."<sup>53</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

<sup>51</sup> <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>, at pg. 17.

<sup>52</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>53</sup> *Id.*; see also "Defined Conditions for Nondisclosure," available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

The Nondisclosure Conditions identify circumstances for which ICANN org's other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that are presumed not to be appropriate for public disclosure (and that the *Amazon EU S.A.R.L.* Independent Review Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). They include, among others:

- i. Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents (Internal Deliberative Process);
- ii. Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications (Constituent Deliberative Process);
- iii. Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations (Personal Privacy);
- iv. Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement (Nondisclosure Agreements);
- v. Confidential business information and/or internal policies and procedures (Confidential Business Information);
- vi. Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (Drafts); and

- vii. Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation (Privilege/Investigation).<sup>54</sup>

Notwithstanding the above, documentary information that falls within any of the Nondisclosure Conditions may still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>55</sup>

## **V. Analysis and Rationale.**

### **A. ICANN Org Adhered to Established Policies and Procedures in Responding to the 2018 DIDP Request.**

#### **1. The 2018 DIDP Response Complies with Applicable Policies and Procedures.**

The Requestor's 2018 DIDP Request sought the disclosure of documents relating to the CPE Process Review. As an initial matter, Request 18-1 noted ICANN org's conclusion that the documents requested in Items 10 and 16 do not exist, and offered no specific challenge to this conclusion.<sup>56</sup> Accordingly, Request 18-1 is best interpreted as focusing on Items No. 1-9, 11-15, and 17-19. Even as to those Items, the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the 2018 DIDP Response. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.<sup>57</sup> This represents a substantive disagreement with ICANN org's discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. However, the BAMC has reviewed the 2018 DIDP Response and, for the reasons

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<sup>54</sup> DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>55</sup> *Id.*

<sup>56</sup> See Request 18-1, § 3, at Pg. 5, § 8, at Pg. 14.

<sup>57</sup> *Id.*, § 6, at Pg. 9-10.

discussed below, concludes that the 2018 DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

In the course of evaluating Request 18-1, ICANN org conducted a review of the documents identified by FTI as part of its review and determined that those documents responsive to Items No. 1-9, 11-15, and 17-19 that were not already publicly available are subject to Nondisclosure Conditions and that the public interest in disclosure does not outweigh the harm that may be caused by disclosing the information, for the reasons discussed below. In the course of that review, ICANN org staff also confirmed that most of the documents do not relate to ICANN org’s operational activities, and are therefore not appropriate subjects of DIDP requests.<sup>58</sup>

a. The Response to Items No. 1, 2, 4, 5, and 9 Complies with Applicable Policies and Procedures.

Items 1, 2, 4, 5, and 9 sought the disclosure of emails relating to the CPE process:

- All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 1);
- All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 2);
- All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request (Item No. 4);
- All emails provided to FTI that (1) are “largely administrative in nature,” (2) “[d]iscuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines” (Item No. 5); and

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<sup>58</sup> See DIDP.



- All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff (Item No. 9).<sup>59</sup>

Consistent with the DIDP Response Process, ICANN org identified documents

responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information;
- Drafts; and
- Privilege/Investigation.<sup>60</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>61</sup>

The Requestor does not challenge the applicability of these Nondisclosure Conditions. Indeed, as ICANN org noted in the 2018 DIDP Response, the Requestor *conceded* that the materials FTI relied on in the CPE Process Review reflect “ICANN’s deliberative and decision-making process concerning the CPE process,”<sup>62</sup> and are therefore subject to the first Nondisclosure Condition identified above.

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<sup>59</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (alterations in original) (internal citations omitted).

<sup>60</sup> 2018 DIDP Response, at Pg. 9-12.

<sup>61</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.*

<sup>62</sup> DIDP Request No. 20180110-1, at Pg. 3.

According to the Requestor, the documents at issue in Request 18-1 “are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has threatened litigation.”<sup>63</sup> The Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure. As discussed further in Section V.B.1. below, ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>64</sup> ICANN org explained in the DIDP Response that it sought consent from the CPE Provider to release the information, but as the Requestor recognized in Request 18-1, the CPE Provider has not agreed to ICANN org’s request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. Nonetheless, the Requestor claims that ICANN org should still be required to produce these documents.<sup>65</sup> But the Requestor points to no policy, procedure, or other commitment undertaken by ICANN that would require it to breach its contractual obligations to accommodate the Requestor. For the reasons discussed in Section V.B.1 below, ICANN org’s policies and procedures do not require ICANN org to breach its contract with the CPE Provider to accommodate the Requestor’s request.

b. The Response to Items No. 6-8 and 11-12 Complies with Applicable Policies and Procedures.

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<sup>63</sup> Request 18-1, § 6, at Pg. 9 (internal quotation marks omitted).

<sup>64</sup> New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A, § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>65</sup> Request 18-1, § 6, at Pg. 8-9.

Items No. 6-8, 11, and 12 sought the disclosure of the CPE Provider's work product:

- All draft CPE Reports concerning .MUSIC, both with and without comments (Item No. 6);
- All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider (Item No. 7);
- All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey" (Item No. 8);
- All of the "CPE Provider's working papers associated with" DotMusic's CPE (Item No. 11); and
- "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets" (Item No. 12).<sup>66</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Drafts; and
- Privilege/Investigation.<sup>67</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the

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<sup>66</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

<sup>67</sup> 2018 DIDP Response, at Pg. 15-19.

disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>68</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP Response Process when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process and ICANN org’s contractual confidentiality obligations to the CPE Provider—applied to the requested items.

c. The Response to Items No. 3 and 13-15 Complies with Applicable Policies and Procedures.

Items No. 3 and 14-16 sought the disclosure of FTI’s work product in the course of the CPE Process Review:

- The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials” (Item No. 3);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel” (Item No. 13);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel” (Item No. 14); and
- FTI’s investigative plan used during its independent review (Item No. 15).<sup>69</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Conditions;

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<sup>68</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.*

<sup>69</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

- Drafts; and
- Privilege/Investigation.<sup>70</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>71</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process and ICANN org’s contractual confidentiality obligations to the CPE Provider—applied to the requested items.

d. The Response to Items No. 17-19 Complies with Applicable Policies and Procedures.

Items No. 17-19 sought the disclosure of correspondence and documents relating to the CPE Process Review and its scope:

- All communications between ICANN and FTI regarding FTI’s independent review (Item No. 17);
- All communications between ICANN and the CPE Provider regarding FTI’s independent review (Item No. 18); and
- All communications between FTI and the CPE Provider regarding FTI’s independent review (Item No. 19).<sup>72</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

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<sup>70</sup> 2018 DIDP Response, at Pg. 13-14.

<sup>71</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials its prior DIDP Requests. *See id.*

<sup>72</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information; and
- Privilege/Investigation.<sup>73</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>74</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process and ICANN org’s contractual confidentiality obligations to the CPE Provider—applied to the requested items.

**2. ICANN Org Adhered to Established Policy and Procedure in Finding Certain That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public’s Interest in Disclosing the Information.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>75</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN org must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to

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<sup>73</sup> 2018 DIDP Response, at Pg. 19-21.

<sup>74</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.*

<sup>75</sup> *Id.*

whether any apply.<sup>76</sup> In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in the 2018 DIDP Response.

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in Items No. 1-9, 11-15, and 17-19. Instead, the Requestor claims that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.<sup>77</sup> According to the Requestor, the public interest in disclosing the requested documents stems from its claim that FTI's conclusions in the CPE Reports "are contrary to the findings of other panels and experts."<sup>78</sup> The Requestor asserts that "in clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider."<sup>79</sup> The Requestor claims that "[w]ithout the underlying documents," it cannot "analyze whether ICANN unduly influenced the CPE Provider."<sup>80</sup> The Requestor's claims do not support reconsideration.

The Board's decision to initiate the CPE Process Review was in part in response to issues raised in the Dot Registry IRP Panel Declaration.<sup>81</sup> The Dot Registry IRP Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be "intimately involved in the [CPE] process."<sup>82</sup> At the same time, the Panel emphasized that the Panel was "not assessing whether ICANN staff or the [CPE

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<sup>76</sup> *Id.*

<sup>77</sup> Request 18-1, § 3, at Pg. 4, § 6, at Pg. 8-10.

<sup>78</sup> *Id.*, § 6, at Pg. 8.

<sup>79</sup> *Id.*, § 6, at Pg. 9.

<sup>80</sup> *Id.*

<sup>81</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>82</sup> Dot Registry IRP Panel Declaration, ¶ 93, at Pg. 35, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook].”<sup>83</sup> In response, the Board undertook serious consideration of the Panel’s comments concerning how ICANN org may have interacted with the CPE provider and the CPE reports, and directed ICANN org to undertake the CPE Process Review.<sup>84</sup>

Critically, the Board did *not* direct that the CPE Process Review come to one conclusion over another, and the Requestor has provided no evidence to the contrary. Instead, FTI was retained to assess—and reach its own conclusions—on three topics: (1) ICANN org’s interactions with the CPE Provider; (2) the way the CPE Provider applied the CPE criteria; and (3) a compilation of the research referenced in the CPE Reports that had been placed on hold. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. Accordingly, the Requestor’s belief that the conclusions in the CPE Process Review Reports are inconsistent with earlier analyses undertaken under different circumstances (such as the Dot Registry IRP) is no more than that—a belief—and it is immaterial. The Requestor provides no evidence to support this claim, because there is none. Its baseless belief does not justify requiring ICANN org to permit the Requestor to conduct its own re-evaluation of the CPE process or of the CPE Process Review Reports, and does not demonstrate that the public interest in disclosing the documents FTI reviewed in the course of the CPE Process Review outweighs the harm that may come from disclosing those documents. This argument does not support reconsideration.

The Requestor next argues that the documents at issue in Request 18-1 “are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has

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<sup>83</sup> *Id.*, ¶ 152, at Pg. 60.

<sup>84</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.



threatened litigation.”<sup>85</sup> The Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure.

The Requestor asserts that “ICANN cannot claim that there is no legitimate public interest in disclosing the requested documents.”<sup>86</sup> But ICANN org did not conclude that there is “no legitimate public interest in disclosing the requested documents.” Instead, ICANN org concluded that “there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”<sup>87</sup> The Requestor also argues that ICANN org “has not disclosed any ‘compelling’ reason that outweighs the public interest in disclosure.”<sup>88</sup> This argument fails because ICANN org *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>89</sup> There is no policy or procedure requiring ICANN org to provide *additional* justification for nondisclosure.<sup>90</sup> Further, ICANN org did explain why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. For example, ICANN org explained that the draft CPE reports and FTI’s notes of interviews of CPE Provider personnel reflected the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports and the Personal Information of

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<sup>85</sup> Request 18-1, § 6, at Pg. 9 (internal quotation marks omitted).

<sup>86</sup> Request 18-1, § 6, at Pg. 8.

<sup>87</sup> 2018 DIDP Response at Pg. 21, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>. Accordingly, there is no merit to any suggestion that ICANN did not make this required determination. See Request 18-1, § 3, at Pg. 4 (“If ICANN determines that the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure, then it can publish the documents. ICANN did not make such a determination.” (internal quotation marks and citation omitted)).

<sup>88</sup> Request 18-1, § 6, at Pg. 10.

<sup>89</sup> 2018 DIDP Response at Pg. 9-21.

<sup>90</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

CPE Provider personnel, two categories of information for which ICANN org is contractually obligated to maintain confidentiality.<sup>91</sup> Accordingly, reconsideration on this basis is not warranted.

Relatedly, the Requestor asserts that rather than state compelling reasons for nondisclosure, ICANN org “ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.”<sup>92</sup>

As an initial matter, the Requestor provides no basis—because there is none—for its unfounded assertions that: (1) ICANN org relied on outside counsel to “ensure[]” that documents would not be subject to public disclosure “based on the attorney-client privilege loophole,” or (2) the documents in question “could expose both ICANN and the CPE Provider” in some unidentified wrong.

Second, the Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the 2018 DIDP Request.<sup>93</sup> No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor’s request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason not to disclose certain documents.<sup>94</sup>

Third, the Requestor’s desire that ICANN org waive that privilege does not demonstrate that the public interest in disclosure outweighs the harm that may occur if privileged materials are disclosed. Weakening the attorney-client privilege by forcing a client—here, ICANN org—to waive that privilege at the request of a third party like the Requestor poses a significant threat

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<sup>91</sup> See, e.g., 2018 DIDP Response, at Pg. 11-12.

<sup>92</sup> Request 18-1, § 6, at Pg. 9.

<sup>93</sup> *Id.*

<sup>94</sup> DIDP Nondisclosure Conditions.

to ICANN org’s ability to trust that its future communications with counsel will be protected, and therefore undermines ICANN org’s ability to communicate candidly with counsel.<sup>95</sup> This potential harm outweighs the public interest in disclosing privileged materials.

The BAMC notes that it is a fundamental principle of law that invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. The BAMC therefore rejects the Requestor’s assertion that the attorney-client privilege is merely a “loophole” that ICANN org sought to take advantage of here, and its suggestion that ICANN org’s invocation of the privilege indicates that ICANN org had anything to hide. Accordingly, reconsideration is not warranted on these grounds.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because “ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology.”<sup>96</sup> Initially, the Requestor is incorrect in its assertion that ICANN org determined that applicants would not be interviewed or submit materials in the course of the CPE Process Review. FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports.<sup>97</sup> FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the investigation because neither the Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Guidebook and the CPE Guidelines, the

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<sup>95</sup> *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”).

<sup>96</sup> Request 18-1, § 6, at Pg. 9.

<sup>97</sup> See, e.g., Scope 2 Report, at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

CPE Provider did not interview the applicants.<sup>98</sup> Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.<sup>99</sup> Despite that conclusion, FTI ensured that it understood the concerns applicants raised in reconsideration requests and IRP proceedings concerning the CPE process.<sup>100</sup> The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one. Accordingly, the Requestor has not demonstrated that FTI's decision not to interview or accept materials submitted by CPE applicants supports the public interest in disclosing the documents that FTI did consider in the course of the CPE Process Review. Reconsideration is not warranted on this basis.

**B. ICANN Org Adhered to Its Commitments and Core Values in Responding to the 2018 DIDP Request.**

**1. ICANN Org Adhered to Its Commitments to Accountability, Openness, and Transparency in Responding to the 2018 DIDP Request.**

The Requestor asserts that ICANN org's determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments to "operate to the maximum extent feasible in an open and transparent fashion,"<sup>101</sup> "apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"<sup>102</sup> and "[r]emain accountable to the Internet community through

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<sup>98</sup> *Id.* at Pg. 8.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

<sup>102</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(v).

mechanisms defined in [the] Bylaws that enhance ICANN’s effectiveness.”<sup>103</sup> The Requestor believes that ICANN org “has violated these Bylaws, and the Commitments contained therein, by refusing to disclose the requested documents.”<sup>104</sup>

As a preliminary matter, the BAMC notes that the DIDP was developed as the result of an independent review of standards of accountability and transparency, which included extensive public comment and community input. The DIDP—and particularly the Nondisclosure Conditions—balance ICANN org’s commitments to transparency and accountability against its competing commitments and obligations.<sup>105</sup>

This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

As the *Amazon EU S.A.R.L.* Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.<sup>106</sup>

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<sup>103</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(vi); *see* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-1. *See* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The BAMC considers Request 18-1 under the Bylaws in effect when the Requestor submitted the reconsideration request, which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor’s claims under the 22 July 2017 version of the Bylaws.

<sup>104</sup> Request 18-1, § 6, at Pg. 8.

<sup>105</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

<sup>106</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.”<sup>107</sup>

A critical competing Core Value is ICANN org’s Core Value of operating with efficiency and excellence<sup>108</sup> by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>109</sup> Confidential Information includes “all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information.”<sup>110</sup> The materials that the CPE Provider shared with ICANN org, ICANN org’s counsel, and FTI reflect the CPE Provider’s Confidential Information, including confidential information relating to its operations, products, and services (e.g., its methods and procedures for conducting CPE analyses), and Personal Information (e.g., its employees’ personally identifying information).

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<sup>107</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(c).

<sup>108</sup> ICANN Bylaws, Art. 1, Section 1.2(b)(v).

<sup>109</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A, § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>110</sup> *Id.*

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.<sup>111</sup> Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org’s request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN org’s contract with the CPE Provider.<sup>112</sup> Accordingly, the Requestor’s generalized invocations of ICANN org’s commitments to transparency, openness, and accountability do not support reconsideration here.

**2. ICANN Org Adhered to Its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the 2018 DIDP Request.**

The Requestor asserts that “[t]here is an ‘international minimum standard of due process as fairness-based on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.’”<sup>113</sup> The Requestor argues that the CPE Process Review did not provide due process to the Requestor

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<sup>111</sup> See, e.g., Response to Request 20150312-1 at Pg. 2, available at

<https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf>.

<sup>112</sup> See DIDP (Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement”).

<sup>113</sup> Request 18-1, § 6, at Pg. 6-7 (quoting Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law,” 23 Duke J. of Comparative and Int’l L. 411, 422 (2013) and Charles T. Kotuby & Luke A. Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes 179 (Mar. 15, 2017)).

because “it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available.”<sup>114</sup>

The BAMC recognizes ICANN org’s commitment to conform to *relevant* principles of international law and conventions.<sup>115</sup> Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>116</sup> ICANN org established the DIDP in support of its commitment to transparency and accountability and with extensive community input. That procedure and those specific commitments are not outweighed by ICANN org’s general commitment to conform to relevant principles of international law. ICANN org was not required to establish a DIDP, but instead did so voluntarily. Accordingly, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment to conform to relevant principles of international law.

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. “[T]he fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.<sup>117</sup> Accordingly, the Board was not obligated to direct ICANN org to undertake the

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<sup>114</sup> *Id.*, § 6, at Pg. 7.

<sup>115</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

<sup>116</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

<sup>117</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.



CPE Process Review at all, let alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor.<sup>118</sup>

The Requestor’s conclusory statement that it has been deprived of due process because it did not have access to every document underlying the CPE Process Review Reports does not support reconsideration. The Requestor asserts—based entirely on speculation—that the CPE Process Review Reports are “the one piece of significant evidence relevant to its Request 16-5.”<sup>119</sup> The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-5.

Further, when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>120</sup> The Board noted that arguments and challenges to the merits of the report issued by the CPE Provider in connection with the community application for the .MUSIC gTLD can be addressed in connection with Request 16-5.<sup>121</sup> Moreover, the BAMC is required to act “on the basis of the public written record, including information submitted by the Requestor.”<sup>122</sup> Accordingly, there is no basis for the Requestor’s assumption that the CPE Process Review Reports are “the one piece of significant evidence relevant to . . . Request 16-5,” particularly in light of the volume of materials submitted by the Requestor in support of Request 16-5.<sup>123</sup> This argument does not support reconsideration.

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<sup>118</sup> For the same reasons, the Board was not required to direct FTI to “attempt[] to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process” or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. *See* 16 January 2018 letter from Ali to ICANN Board, at Pg. 3, 5, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

<sup>119</sup> Request 18-1, § 6, at Pg. 7.

<sup>120</sup> *See* ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>121</sup> *See id.*

<sup>122</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(p).

<sup>123</sup> Request 18-1, § 6, at Pg. 7.

For all of the reasons discussed above, reconsideration is not warranted.

## **VI. Recommendation.**

The BAMC has considered the merits of Request 18-1, and, based on the foregoing, concludes that ICANN org did not violate ICANN’s Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the 2018 DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 18-1.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical, in which case the BAMC “shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request.”<sup>124</sup> Request 18-1 was submitted on 10 March 2018. To satisfy the thirty-day target deadline, the BAMC would have to have acted by 9 April 2018. Due to scheduling, the first opportunity that the BAMC has to consider Request 18-1 is 5 June 2018, which is within 90 days of receiving Request 18-1.<sup>125</sup>

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<sup>124</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

<sup>125</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

## Rebuttal to the BAMC's Recommendation on Reconsideration Request 18-1

Requestor<sup>1</sup> submits this Rebuttal to the Board Accountability Mechanisms Committee's ("BAMC") Recommendation on Reconsideration Request 18-1 (the "Recommendation").<sup>2</sup> The Recommendation concerns Requestor's request that ICANN reconsider its refusal to disclose the documents requested in Requestor's DIDP Request.<sup>3</sup> The denied document requests all involve the disclosure of pre-existing documents and, despite the Recommendation's claims, are not requests "to create or compile summaries of any documented information."<sup>4</sup> Specifically, Requestor submitted nineteen requests:

1. All "[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)" that were provided to FTI by ICANN as part of its independent review;
2. All "[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)" that were provided to FTI by ICANN as part of its independent review;
3. The "list of search terms" provided to ICANN by FTI "to ensure the comprehensive collection of relevant materials;"
4. All "100,701 emails, including attachments, in native format" provided to FTI by ICANN in response to FTI's request;
5. All emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;"

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in Requestor's Reconsideration Request 18-1. *See* Exhibit 23, DotMusic Reconsideration Request 18-1 (Mar. 10, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

<sup>2</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

<sup>3</sup> *See* Exhibit 23, DotMusic Reconsideration Request 18-1 (Mar. 10, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

<sup>4</sup> *See* Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 10, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" Requestor's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and

19. All communications between FTI and the CPE Provider regarding FTI's independent review.<sup>5</sup>

ICANN refused to disclose these documents to Requestor. This DIDP Response is clearly improper because (1) ICANN's assertion that the responsive documents fall under of Nondisclosure Conditions is conclusory and unsupported by any evidence; (2) the public interest outweighs any Nondisclosure Condition; and (3) ICANN's decision violates its Commitments and Core Values. The BAMC's Recommendation now attempts to justify ICANN's decision, which improperly implies that several of ICANN's Commitments and Core Values are not implicated in the DIDP Response, that Requestor made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response.<sup>6</sup>

#### **1. The DIDP Response Must Adhere to ICANN's Commitments and Core Values**

ICANN must comply with its Commitments and Core Values, even when issuing the DIDP Response, or ICANN will violate its own Bylaws. ICANN is required to "act in a manner consistent with [its] Bylaws"<sup>7</sup> and "in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values"<sup>8</sup> in performing its mission "to ensure the stable and secure operation of the Internet's unique identifier systems."<sup>9</sup> There is no exception carved out for the DIDP in the Bylaws. Therefore, ICANN must act "in conformity with relevant principles of international law and international conventions and applicable local law" during the DIDP process.<sup>10</sup>

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<sup>5</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), pp. 3-6, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>6</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 31, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

<sup>7</sup> Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a).

<sup>8</sup> *Id.* at Art. 1, §1.2.

<sup>9</sup> *Id.* at Art. 1, § 1.1(a).

<sup>10</sup> *Id.* at Art. 1, §1.2(a).

The ICANN Bylaws thus require that ICANN comply with principles of international law, which includes due process. The BAMC is attempting to circumvent the Bylaws by arguing in the Recommendation that can ignore international legal principles because (1) ICANN can establish its own accountability mechanisms<sup>11</sup> and (2) ICANN’s commitment to transparency outweighs its commitment to principles of international law. However, the ICANN Bylaws require that ICANN “carry[] out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes.”<sup>12</sup> This “puts principles of international law first, before ... local law and ICANN’s Bylaws.”<sup>13</sup> Resultantly, “any principles enshrined in California law, ICANN’s Articles ... and/or ICANN’s Bylaws will only apply to the extent that they are fully compatible with international law.”<sup>14</sup>

Hence, the BAMC’s arguments are untenable based on ICANN’s own Bylaws. While ICANN established its own corporate accountability mechanisms, its Bylaws require that these mechanisms comply with international legal principles. The principles of transparency and accountability thus cannot supersede these international principles pursuant to ICANN’s Bylaws; rather international legal principles “serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted”—including ICANN’s accountability mechanisms.<sup>15</sup> As such, neither of the BAMC’s excuses for ignoring the international principle of due process hold water.

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<sup>11</sup> The Recommendation refers to due process as a “[c]onstitutional protection” or a “constitutional right.” Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 29, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>. The BAMC may be confusing the *constitutional right* to due process, contained in the United States Constitution and applicable to the American government, with the international *principle* of due process.

<sup>12</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a).

<sup>13</sup> Exhibit 29, Flip Petition, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. 40.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 39.

## 2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness

The DIDP is “[a] principal element of ICANN's approach to transparency and information disclosure.”<sup>16</sup> This principle of transparency “is one of the essential principles in ICANN’s creation documents, and its name reverberated through its Articles and Bylaws.”<sup>17</sup> ICANN’s Articles of Incorporation commit it to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>18</sup> ICANN’s Bylaws contain the same language<sup>19</sup> and, in addition to dedicating an entire Article on transparency,<sup>20</sup> reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be “accountable and transparent.”<sup>21</sup> The Recommendation even admits that the DIDP complies with the principle of transparency:

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org’s approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN org’s operational activities.<sup>22</sup>

ICANN’s refusal to disclose the requested documents is in direct contravention of this stated Commitment to transparency, as well as ICANN’s other Commitments and Core Values.

However, ICANN did not adhere to its Commitment to openness and transparency when it denied Requestor’s requests for further information about the ongoing review of the CPE process.

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<sup>16</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>17</sup> Exhibit 12, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>18</sup> Exhibit 25, ICANN Articles of Incorporation, § 2.III.

<sup>19</sup> Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a).

<sup>20</sup> *See id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

<sup>21</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>22</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 9, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

The CPE has affected several gTLD applicants through its inconsistent application of the CPE criteria,<sup>23</sup> drawing criticism from legal experts<sup>24</sup> and even the Council of Europe.<sup>25</sup> Yet, the actual content and scope of the review has been mired in secrecy. Despite its Commitments to transparency and openness, ICANN still has not disclosed relevant information about the independent review to the community applicants. For instance, Requestor and the other applicants do not know (1) critical information regarding the independent review process that would be available through documents believed to be in ICANN's possession, such as the selection process for the independent evaluator; (2) the terms and scope of FTI's work for ICANN; and (3) the documents relied on by FTI in conducting its independent review. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

### **3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure**

The independent review is significant not only to Requestor but also to other gTLD applicants. Its results may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.<sup>26</sup> This evaluation process has clearly disproportionately treated

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<sup>23</sup> See Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (listing several community applicants with pending reconsideration requests).

<sup>24</sup> See Exhibit 26, Letter from Arif Ali to ICANN CEO Göran Marby and the BGC (Jan. 30, 2017), p. 2, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>.

<sup>25</sup> Eve Salomon & Kinanya Pijil, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>26</sup> See Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (listing several community applicants with pending reconsideration requests).



community gTLD applicants by inconsistently and unfairly applying criteria between applicants. And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process in violation of the principle of transparency.

ICANN's refusal to disclose relevant documents through its DIDP also violates the principle of fairness. ICANN specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).<sup>27</sup>

It further committed itself to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>28</sup>

ICANN's DIDP Response is in clear violation of this Commitment. There is an undeniable problem with the consistency and fairness of the CPE process, evident by ICANN's own investigation of the CPE process and by the CPE Provider's lack of cooperation with the investigation. Clearly, the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.<sup>29</sup> This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from

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<sup>27</sup> Exhibit 4, ICANN Bylaws, Art. 3, § 3.1.

<sup>28</sup> *Id.* at Art. 1, § 1.2(a)(v).

<sup>29</sup> See Exhibit 28, Minutes of BGC Meeting (Aug. 1, 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en> (“This is in large part because, despite repeated requests from ICANN beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced.”).

certain community gTLDs, such as .MUSIC. Despite the clear public interest in maintaining a fair CPE process, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself.

ICANN's failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. While trying to allay concerns about CPE Review Process and defend its reluctance to disclose documents, ICANN has argued that the requested documents are covered by its Nondisclosure Conditions. However, neither ICANN nor the BAMC provide any analysis on whether each requested document is covered by a Nondisclosure Condition. They only state that they applied the "balancing test,"<sup>30</sup> expecting Requestor to simply accept the test's conclusions without question.

Furthermore, the BAMC suggests that rejecting the disclosure of the requested documents does not violate its Commitments. The Recommendation implies that the BAMC can ignore the ICANN Bylaws because (i) "the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues;" (ii) "the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let

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<sup>30</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 26, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf> ("[The] "balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.").

alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor;” and (iii) the Board was not required to direct FTI to “attempt[] to gather additional information and alternate explanations from community priority applicants, including Requestor, to ensure that it was conducting a fair and thorough investigation about the CPE Process or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants.”<sup>31</sup> ICANN thus suggests that Requestor should be satisfied that there was a CPE Process Review and that any requests in relation to it are irrelevant because ICANN was not obliged to conduct a CPE Review Process in the first place. This view ignores the simple fact that, regardless of whether ICANN voluntarily acted, ICANN is obligated to adhere to its Bylaws.

ICANN’s actions are in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. Given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

#### **4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness**

ICANN’s refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. ICANN has committed itself to “[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN’s effectiveness.”<sup>32</sup> ICANN is also committed to two Core Values: (1) “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up,

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<sup>31</sup> *Id.* at pp. 29-30.

<sup>32</sup> Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a)(vi).

multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”<sup>33</sup> and (2) “[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.”<sup>34</sup>

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. ICANN has kept secret details regarding the review process, prohibiting informed participation in the independent review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In additions to violating its Bylaws, ICANN’s attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

## **5. Conclusion**

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 18-1. The Board should grant Request 18-1 and produce the requested documents regarding the CPE independent review.



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Arif Hyder Ali

June 20, 2018

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Date

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<sup>33</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>34</sup> *Id.* at Art. 1, § 1.2(b)(v).

## REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.2b

**TITLE:** **Consideration of Reconsideration Request 18-2**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 18-2.

Attachment A is [Reconsideration Request 18-2](#), submitted on 15 March 2018.

Attachment B is the [Ombudsman Action on Request 18-12](#), dated 17 April 2018.

Attachment C is the [BAMC Recommendation on Request 18-2](#), issued 5 June 2018.

Attachment D is the Requestor's [Rebuttal](#) to the BAMC Recommendation on Request 18-2, submitted on 20 June 2018.

### **Background Links**

The following links are relevant to the Board's consideration of Reconsideration Request 18-2.

Exhibits 1 to 32 submitted in support of Request 18-2 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-exhibits-1-redacted-15mar18-en.pdf>.

Exhibits 33 to 38 submitted in support of the Requestor's [Rebuttal](#) to the BAMC Recommendation on Request 18-2, submitted on 20 June 2018 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-exhibits-33-redacted-20jun18-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 10 July 2018

Email: amy.stathos@icann.org

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requestor Information**

Requestor:

**Name:** dotgay LLC

**Address:** Contact Information Redacted

**Email:** Jamie Baxter Contact Information Redacted

Requestor is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, 1900 K Street, NW Washington, DC 20006-1110

**Email:** Contact Information  
Redacted

### **Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

dotgay LLC (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180115-1, in which ICANN refused to disclose certain requested documents pursuant to the DIDP.

On January 15, 2018, Requestor submitted a DIDP request (the “DIDP Request”) seeking disclosure of documentary information relating to FTI Consulting, Inc.’s (“FTI”) independent

review of the Community Priority Evaluation (“CPE”) process.<sup>1</sup> Specifically, Requestor submitted 21 document requests:

Request No. 1: All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;<sup>2</sup>

Request No. 2: All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;<sup>3</sup>

Request No. 3: The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”<sup>4</sup>

Request No. 4: All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;<sup>5</sup>

Request No. 5: All emails provided to FTI that (1) are “largely administrative in nature,” (2) “discuss[ ] the substantive of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”<sup>6</sup>

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<sup>1</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>2</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 3 (citing Exhibit 2, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; Exhibit 3, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), p. 7, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

<sup>3</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 3-4 (citing Exhibit 2, Scope 1 Report, p. 6; Exhibit 3, Scope 2 Report, p. 7).

<sup>4</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 10).

<sup>5</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 10).

<sup>6</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, pp. 11-12).

Request No. 6: All draft CPE Reports concerning .GAY, both with and without comments;<sup>7</sup>

Request No. 7: All draft CPE Reports concerning .GAY in redline form and/or feedback or suggestions given by ICANN to the CPE provider;<sup>8</sup>

Request No. 8: All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey;”<sup>9</sup>

Request No. 9: All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, and Christine Willett;<sup>10</sup>

Request No. 10: The 13 January 2017 engagement letter between FTI and ICANN;<sup>11</sup>

Request No. 11: The original Request for Proposal (RFP) pertaining to FTI’s review of the CPE process;

Request No. 12: All of the “CPE Provider’s working papers associated with” dotgay’s CPE;<sup>12</sup>

Request No. 13: “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”<sup>13</sup>

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<sup>7</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 15).

<sup>8</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, pp. 13-16).

<sup>9</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 16).

<sup>10</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 13).

<sup>11</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p 5 (citing Exhibit 4, Reference Materials – Board Submission No. 2017.09.23.0a (23 Sep. 2017), p. 363, <https://www.icann.org/en/system/files/bm/briefing-materials-1-2-redacted-23sep17-en.pdf>).

<sup>12</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5(citing Exhibit 5, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>., p. 6).

<sup>13</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 7).



Request No. 14: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”<sup>14</sup>

Request No. 15: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”<sup>15</sup>

Request No. 16: FTI’s investigative plan used during its independent review;<sup>16</sup>

Request No. 17: FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”<sup>17</sup>

Request No. 18: All communications between ICANN and FTI regarding FTI’s independent review;

Request No. 19: All communications between ICANN and the CPE Provider regarding FTI’s independent review;

Request No. 20: All communications between FTI and the CPE Provider regarding FTI’s independent review; and

Request No. 21: All documents and communications regarding the scope of FTI’s independent review.

On February 14, 2018, ICANN responded to the DIDP Request (the “DIDP Response”) by denying all of the requests except for Request Nos. 10, 11, and 17—which ICANN claims “does not exist.”<sup>18</sup> ICANN reasoned that the requested documents are not appropriate for disclosure based on the Nondisclosure Conditions.<sup>19</sup>

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<sup>14</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

<sup>15</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

<sup>16</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

<sup>17</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 9).

<sup>18</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>19</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

**4. Date of action/inaction:**

ICANN acted on February 14, 2018 by issuing the DIDP Response.

**5. On what date did you become aware of action or that action would not be taken?**

Requestor became aware of the action on February 14, 2018, when it received the DIDP Response.

**6. Describe how you believe you are materially affected by the action or inaction:**

Requestor is materially affected by ICANN's refusal to disclose certain documents concerning FTI's independent review of the CPE because ICANN intends to rely on FTI's three reports (the "FTI Reports") in order to make a decision on Requestor's Reconsideration Request 16-3 ("Request 16-3"), which concerns Requestor's community application for the .GAY generic Top-Level Domain ("gTLD"). The procedural and substantive problems with the FTI Reports, as discussed further below, means that ICANN's reliance on the FTI Reports will materially and adversely affect Requestor's rights regarding Request 16-3 and its community application for the .GAY gTLD. Requestor cannot even properly analyze the conclusions contained in the FTI Reports because ICANN refuses to disclose the underlying documents. ICANN's decision to deny access to these documents both prevents a proper analysis of the FTI Reports and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

**6.1 The Flaws in the Community Evaluation for .GAY and the FTI Reports**

Requestor filed a community-based application for the .GAY gTLD. However, the Economist Intelligence Unit (the "EIU") determined that Requestor failed the CPE; ICANN

resultantly rejected the application. Requestor sought reconsideration of that determination through Request 16-3, which raises several problems with dotgay’s CPE.<sup>20</sup> As explained by Prof. William N. Eskridge of Yale Law School, the CPE is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.<sup>21</sup>

In January 2017, ICANN retained FTI to review the CPE process and “the consistency in which the CPE criteria were applied” by the EIU.<sup>22</sup> It concluded its independent review based on information and materials from ICANN and the EIU, and wrote the FTI Reports. On December 13, 2017, ICANN published the FTI Reports on the CPE process.<sup>23</sup> The first report, “Communications Between ICANN Organization and the CPE” (“Scope 1 Report”), concluded that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider.”<sup>24</sup> The “Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports” (“Scope 2 Report”) found that the EIU “consistently applied the CPE criteria throughout all

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<sup>20</sup> Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>21</sup> See Exhibit 7, Letter from Arif Ali, on behalf of dotgay LLC, to the ICANN Board attaching the Expert Opinion of Prof. William N. Eskridge (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

<sup>22</sup> Exhibit 32, Letter from C. Disspain to A. Ali (10 Oct. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-to-ali-10oct17-en.pdf>.

<sup>23</sup> Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>24</sup> Exhibit 2, Scope 1 Report, p. 17.

Community Priority Evaluations.”<sup>25</sup> And, finally, the “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests” (“Scope 3 Report”) determined that the researched referenced in the CPE reports were reflected in the research materials.<sup>26</sup>

Given that FTI reviewed the CPE process and whether the EIU consistently applied the CPE criteria, its findings directly affect the outcome of Request 16-3.<sup>27</sup> This is especially concerning for Requestor because Prof. William N. Eskridge, Jr. has identified significant problems with FTI’s purported “independent” review of the CPE process.<sup>28</sup> His examination of the Scope 2 Report, for instance, reveals that the report “is long on description and conclusory statements and short on actual evaluation.”<sup>29</sup> The fact that the FTI Reports are clearly supported by no independent analysis emphasizes the problems with both the “independent” review method used by FTI and the conclusions it reached in the reports.

## **6.2 ICANN Breached its Bylaws in the DIDP Response**

Since Request 16-3 is currently pending before the ICANN Board, and the FTI Reports will likely impact the ICANN Board’s consideration of Request 16-3, Requestor filed the DIDP Request seeking various categories of documents concerning FTI’s independent review the CPE process and the FTI Report’s documentary basis. In submitting this DIDP Request, Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . , carrying out its

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<sup>25</sup> Exhibit 3, Scope 2 Report, p. 57.

<sup>26</sup> Exhibit 5, Scope 3 Report, pp. 57-58.

<sup>27</sup> Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>28</sup> See Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>29</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), ¶ 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>30</sup> ICANN failed to do so.

### **6.2.1 ICANN Must Comply with International Law and Conventions**

The ICANN Bylaws require that it comply with international law and conventions. Pursuant to these laws and conventions, there is an “an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems.”<sup>31</sup> This principle is violated “when a decision is based upon evidence and argumentation that a party has been unable to address.”<sup>32</sup> The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.<sup>33</sup> While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the Second Expert Opinion of Professor William N. Eskridge, it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-3—the FTI Reports—and therefore threatening its due process rights.

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<sup>30</sup> Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(a).

<sup>31</sup> Exhibit 12, Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law” 23 *Duke J. of Comparative and Int’l L.* 411, 422 (2013).

<sup>32</sup> Exhibit 13, Charles T. Kotuby and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 179 (Mar. 15, 2017).

<sup>33</sup> Exhibit 14, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. . . . While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

## 6.2.2 ICANN Must Remain Accountable, Transparent, and Open

ICANN’s Bylaws also require that ICANN hold itself to high standards of transparency, accountability, and openness.<sup>34</sup> These standards require that ICANN (1) “employ[] open and transparent policy development mechanisms;”<sup>35</sup> (2) “apply[] documented policies neutrally and objectively, with integrity and fairness;”<sup>36</sup> and (3) “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>37</sup>

ICANN has violated its transparency obligations by refusing to disclose the requested documents in lieu of hiding behind its Nondisclosure Conditions. By acting in a closed-off and non-transparent manner, ICANN only raises additional questions as to the credibility, reliability, and trustworthiness of the CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for Requestor’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>38</sup>

Instead of publishing the necessary documents for a critical analysis of the FTI Reports, and thus the basis for their erroneous conclusions regarding the CPE process, ICANN continues to try and avoid any accountability for its actions in regards to the CPE. This is most evident in its responses to the DIDP Request; ICANN, in an obvious attempt to side-step the disclosure of any responsive documents, attempts to argue that FTI’s independent review “includes the information responsive to” the requests.<sup>39</sup> However, the alleged ‘responsive information’ is the

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<sup>34</sup> Exhibit 11, ICANN Bylaws, Arts. 1, 3-4.

<sup>35</sup> Exhibit 11, ICANN Bylaws, Art. 3, § 3.1.

<sup>36</sup> Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(v).

<sup>37</sup> Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(vi).

<sup>38</sup> Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>39</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

*exact same language stated by Requestor as the basis for its request for documents.*<sup>40</sup> The fact that “FTI provided ICANN organization with a list of search terms”<sup>41</sup> does not in any way produce “[t]he ‘list of search terms’ provided to ICANN.”<sup>42</sup>

### **6.3 The Public Interest Outweighs Any Compelling Reasons for Nondisclosure**

ICANN cannot simply circumvent its own Bylaws by hiding behind the Nondisclosure Conditions because the public interest clearly outweighs any “compelling reasons” for nondisclosure. It is surprising how ICANN maintains that it can ask everyone affected by the FTI Reports to accept their conclusions without question, even where there are clear problems and contradictions contained within the reports. For instance, in clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.<sup>43</sup> However, it is impossible to analyze whether ICANN unduly influenced the EIU without the underlying documents; these documents are given even greater import because ICANN argued that “the CPE Provider has not agreed [to disclose the documents] . . . and has threatened litigation.”<sup>44</sup> The problem with this excuse is compounded by the simple fact that the DIDP Request only asked for documents provided to FTI and, as such, ICANN has already disclosed those same documents to FTI as part of its review rather than keep them confidential. ICANN’s failure to disclose the requested documents only underscores the serious questions that have been raised by Requestor

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<sup>40</sup> Compare Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 4-5 with Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

<sup>41</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14 (citing Scope 1 Report, p. 10).

<sup>42</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4.

<sup>43</sup> See Exhibit 31, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>44</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 9, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

about the impartiality, independent legitimacy, and credibility of FTI's investigation. Such an action harms the global public interest, Requestor, and the entire gay community.

Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.<sup>45</sup> Instead, ICANN deliberately chooses to hide behind waivable privileges as an excuse to not disclose the documents. ICANN admits that "ICANN organization's outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law."<sup>46</sup> Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags. It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI's findings and conclusions.

In order to resolve the serious questions concerning the credibility of FTI's investigation, it is critically important that ICANN disclose the requested materials to Requestor and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by Requestor that were denied by ICANN in its DIDP Response.

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<sup>45</sup> Exhibit 15, ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial."), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>46</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 11, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.



**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN's action materially affects the global gay community. Its nondisclosure has negatively impacted the fair resolution of the .GAY gTLD in accordance with the ICANN Bylaws and international law, and raises serious questions about the consistency, transparency, and fairness of FTI's review of the CPE process. Openness, transparency, and accountability are key components of ICANN's identity and ICANN is purposefully ignoring them by impeding efforts to analyze the FTI Reports. As such, ICANN has only increased the likelihood of an expensive Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requestor's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that "there are no circumstances at this point in time for which the public interest in disclosing the information [that] outweighs the harm that may be caused by the requested disclosure" is untenable.<sup>47</sup> There is significant public interest in the information underpinning the FTI Reports, which may have a significant impact on the CPE process as a whole and the future of the New gTLD Program because both the ICANN Board and the BAMC may rely upon the FTI Reports in determining reconsideration requests relating to the CPE process—including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the credibility of the FTI investigation.

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<sup>47</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 22.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 Background**

Requestor elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant.<sup>48</sup> In response, Requestor, supported by multiple community organizations, filed a reconsideration request with the Board Governance Committee (“BGC”). The BGC granted the request because the EIU did not follow procedure during the CPE process. As a result, the Requestor’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.<sup>49</sup>

When this issue was brought before the BGC via another reconsideration request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. Requestor therefore filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>50</sup> The ICANN Board, though, remained silent in regards to Request 16-3.

Almost a year later, and after numerous letters to ICANN,<sup>51</sup> Requestor finally heard from

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<sup>48</sup> Exhibit 16, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>49</sup> See Exhibit 17, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>50</sup> See Exhibit 18, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>51</sup> See Exhibit 19, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 7, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board->

ICANN on April 26, 2017. Requestor received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. ... The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: ... 16-3 (.GAY) ... .<sup>52</sup>

## 8.2 The Prior DIDP Requests

In response to this new information regarding the delay, on May 18, 2017, Requestor filed a DIDP request in relation to the .GAY CPE (the “First DIDP Request”).<sup>53</sup> Requestor, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>54</sup> It asked ICANN for this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>55</sup>

Prior to responding to the First DIDP Request, ICANN issued the CPE Process Review

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redacted-13sep16-en.pdf; Exhibit 18, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 20, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 21, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>52</sup> See Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>53</sup> Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>54</sup> Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>55</sup> Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

Update on June 2, 2017.<sup>56</sup> The publication briefly described the scope of FTI’s independent review and its “two parallel tracks.”<sup>57</sup> No other information was provided to the Requestor regarding the CPE Review Process at issue in its Request until ICANN issued its inadequate formal response to the DIDP Request on June 18, 2017 (“First DIDP Response”).<sup>58</sup> The First DIDP Response disclosed none of the requested documents and instead maintained the secrecy that surrounds FTI’s “independent investigation of the CPE.”<sup>59</sup>

In response to the CPE Review Process Update, and the lack of any additional information from ICANN, the Requestor sent ICANN a joint letter with DotMusic Limited on June 10, 2017 (the “Second DIDP Request”). The letter requested more information related to FTI’s review based on the CPE Review Process Update in order “to ensure the integrity of FTI’s review.”<sup>60</sup>

However, on July 10, 2017, ICANN issued a response that simply reiterated already-provided information regarding the BGC’s decision to review the CPE Process and FTI’s independent review (“Second DIDP Response”).<sup>61</sup> ICANN further denied the requests for information.<sup>62</sup> ICANN, in providing such a response, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy.<sup>63</sup>

In response to the First DIDP Response and Second DIDP Response, Requestor initiated

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<sup>56</sup> Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>57</sup> Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>58</sup> Exhibit 25, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>59</sup> See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

<sup>60</sup> Exhibit 27, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

<sup>61</sup> Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>62</sup> Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>63</sup> See Exhibit 29, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

separate reconsideration requests for each DIDP request.<sup>64</sup> The processes for both of these requests have concluded and the matters are currently undergoing the Cooperative Engagement Process (“CEP”) pending ICANN’s consideration of Request 16-3.<sup>65</sup>

### **8.3 The DIDP Request**

After Requestor initiated the separate reconsideration requests, FTI concluded its independent review. On December 13, 2017, ICANN published the FTI Reports.<sup>66</sup> Requestor’s expert has reviewed the FTI Reports and concluded that (1) The FTI Reports are “based on a superficial investigative methodology wholly unsuited for the purpose of an independent review;”<sup>67</sup> (2) the Scope 2 Report “is long on description and conclusory statements and short on actual evaluation;”<sup>68</sup> and (3) the Scope 3 Report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to” the Requestor’s CPE.<sup>69</sup>

Given Requestor’s concerns about the FTI Reports, it submitted a request for documents “to obtain the documents provided by ICANN to [FTI] in connection with FTI’s so-called

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<sup>64</sup> See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>; Exhibit 28, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

<sup>65</sup> See Exhibit 30, Cooperative Engagement and Independent Review Processes Status Update (Jan. 31, 2018), <https://www.icann.org/en/system/files/files/irp-cep-status-31jan18-en.pdf>, p. 1.

<sup>66</sup> Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>67</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 1.

<sup>68</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 2.

<sup>69</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 3.

independent review of ICANN’s [CPE].”<sup>70</sup> The specific requests, as described in **Question 3** above, sought information explicitly identified by ICANN and FTI related to the FTI Reports.<sup>71</sup>

ICANN responded to the DIDP Request on February 14, 2018.<sup>72</sup> It argued that it could not disclose the requested documents because the EIU did not consent to the disclosure of documents.<sup>73</sup> However, all of the documents that Requestor seeks from ICANN has already been disclosed to FTI; it is not seeking documents that the EIU refused to provide to FTI.<sup>74</sup> And, yet, ICANN refused Request Nos. 1-9, 12-16, and 18-21 because the “CPE Process Review Reports includes the information responsive to these Items” and based upon the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making processes by inhibiting the candid exchange of ideas and communications . . . .
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation. . . .
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process[.] . . .

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<sup>70</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

<sup>71</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>72</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>73</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>74</sup> See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceeding of internal appeal mechanisms and investigations. ...
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>75</sup>

As discussed in **Questions 6 and 7** above, the public interest warrants disclosure of documents related to FTI’s independent review of the CPE; disclosure is necessary to ensure that the independent review remains a fair, transparent, and independent process.

ICANN further confirmed that the three remaining document requests (Request Nos. 10, 11, and 17) do not exist: (1) “the 13 January 2017 engagement letter between FTI and ICANN;”<sup>76</sup> (2) “the original Request for Proposal (RFP) pertaining to FTI’s review of the CPE Process;”<sup>77</sup> and (3) “FTI’s follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided.”<sup>78</sup>

## **9. What are you asking ICANN to do now?**

Requestor asks ICANN to disclose the documents requested under Request Nos. 1-9, 12-16, and 18-21.

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<sup>75</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>76</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

<sup>77</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 18.

<sup>78</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 20.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, Requestor is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its DIDP Request, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents—the gay community—is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

This is not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.*



*Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

March 15, 2018

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Date

**Subject:** Re: [Reconsideration Request] Reconsideration Request 18-2  
**Date:** Tuesday, April 17, 2018 at 7:34:26 AM Pacific Daylight Time  
**From:** Herb Waye (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman, Dave Marglin

Reconsideration Request 18-2

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-2.

Best regards,

Herb Waye  
ICANN Ombudsman

[https://www.icann.org/ombudsman\[icann.org\]](https://www.icann.org/ombudsman[icann.org])  
[https://www.facebook.com/ICANNOmbudsman\[facebook.com\]](https://www.facebook.com/ICANNOmbudsman[facebook.com])  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

[https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org])

Community Anti-Harassment Policy

[https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en\[icann.org\]](https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org])

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Monday, April 16, 2018 at 12:44 PM  
**To:** Herb Waye <herb.waye@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Request 18-2

Dear Herb,

ICANN recently received the attached reconsideration request (Request 18-2), which was submitted on 15 March 2018 by dotgay LLC seeking reconsideration of ICANN's response to the Requestor's DIDP regarding the Community Priority Evaluation Process Review. Exhibits 1 through 32 in support of Request 18-2 are available at [https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-exhibits-1-redacted-15mar18-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-exhibits-1-redacted-15mar18-en.pdf[icann.org]).

The Board Accountability Mechanisms Committee (BAMC) has determined that Request 18-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.

Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 18-2 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 18-2 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 18-2.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-2  
5 JUNE 2018**

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The Requestor, dotgay LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (2018 DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .GAY (Application or dotgay Application), which was placed in a contention set with three other .GAY applications.<sup>3</sup> The Requestor participated in CPE, but did not prevail. The Requestor has challenged the CPE Provider's evaluation of its Application in Reconsideration Request 15-21 (Request 15-21), which the Board Governance Committee (BGC) denied,<sup>4</sup> and in Request 16-3, which is pending.<sup>5</sup>

While Request 16-3 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>6</sup> The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each

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<sup>1</sup> Request 18-2, § 3, at Pg. 1-4.

<sup>2</sup> Request 18-2, § 6, at Pg. 6-10.

<sup>3</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>4</sup> BGC Determination on Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>5</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>6</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.<sup>7</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.<sup>8</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>9</sup>

On 15 January 2018, the Requestor submitted the 2018 DIDP Request. The Requestor sought 21 categories of documents and information relating to the CPE Process Review.<sup>10</sup> On 14 February 2018, ICANN org responded to the 2018 DIDP Request (2018 DIDP Response). ICANN provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the 2018 DIDP Response. Notwithstanding the Nondisclosure Conditions, ICANN org "also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>11</sup> Additionally, in response to three of the requested items, ICANN org explained that the requested documentary information did not exist.<sup>12</sup>

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<sup>7</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>8</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>9</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>10</sup> 2018 DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>11</sup> Response to DIDP Request No. 20180115-1; Request 18-2 Ex. 6, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>12</sup> *Id.*

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>13</sup>

On 15 March 2018, the Requestor filed the instant Reconsideration Request 18-2 (Request 18-2), which challenges certain portions of the 2018 DIDP Response. The Requestor claims that, in declining to produce certain requested documents responsive to Items No. 1-9, 12-16, and 18-21, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>14</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-2 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>15</sup>

The BAMC has considered Request 18-2 and all relevant materials and recommends that the Board deny Request 18-2 because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

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<sup>13</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>14</sup> Request 18-2, § 6, at Pg. 6-10.

<sup>15</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-2, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

## II. Facts.

### A. The CPE Provider's Evaluations of the Requestor's .GAY Application.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 April 2014, the Requestor's Application was invited and the Requestor accepted to participate in CPE.<sup>16</sup>

On 6 October 2014, the CPE panel issued a "First CPE Report," concluding that the Application did not qualify for community priority.<sup>17</sup> The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report.<sup>18</sup> The BGC granted reconsideration on Request 14-44 on the grounds that the CPE Provider had inadvertently failed to verify some letters of support for the Application.<sup>19</sup> At the BGC's direction, the CPE Provider conducted a "Second CPE" of the Application. The Application did not prevail in the Second CPE.<sup>20</sup>

On 22 October 2015, the Requestor sought reconsideration of the Second CPE Report (Request 15-21),<sup>21</sup> and filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).<sup>22</sup> Following ICANN org's response to the 2015 DIDP Request,<sup>23</sup> the Requestor revised Request 15-21 to include a challenge the response to the 2015 DIDP Request in addition to the Second CPE

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<sup>16</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>. *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

<sup>17</sup> *See* CPE Report at 1.

<sup>18</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>19</sup> *Id.* at Pg. 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>23</sup> Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

report.<sup>24</sup>

On 1 February 2016, the BGC denied Request 15-21.<sup>25</sup> On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the Second CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.<sup>26</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>27</sup>

### **B. The CPE Process Review.**

While Request 16-3 was still pending, ICANN's Board directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).<sup>28</sup>

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.<sup>29</sup> The BGC determined that, in addition to reviewing the process by which ICANN org interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>30</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI

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<sup>24</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>25</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>26</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>27</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>28</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>29</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>30</sup> *Id.*



Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-3, would be on hold until the CPE Process Review was completed.<sup>31</sup>

On 13 December 2017, ICANN org published the three reports issued in connection with the CPE Process Review.<sup>32</sup>

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review (the 2018 Resolutions).<sup>33</sup>

**C. Relevant Prior DIDP Requests from the Requestor Seeking Documents Regarding the CPE Process Review.**

While the CPE Process Review was pending, the Requestor submitted two DIDP Requests seeking documents and information relating to the CPE Process Review.<sup>34</sup> The Requestor subsequently filed two Reconsideration Requests, Requests 17-3 and 17-4, which

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<sup>31</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>32</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>33</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>34</sup> See DIDP Request No. 20170518-1, available at <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

challenged certain portions of ICANN org’s Responses to those two DIDP Requests.<sup>35</sup> The Board denied both Requests 17-3 and 17-4.<sup>36</sup>

**D. The 2018 DIDP Request.**

On 15 January 2018, the Requestor submitted the 2018 DIDP Request, seeking 21 categories of documents.<sup>37</sup> On 14 February 2018, ICANN org responded to the 2018 DIDP Request. ICANN org provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org’s possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions. Notwithstanding the Nondisclosure Conditions, ICANN org “also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”<sup>38</sup> Additionally, ICANN org explained that the documentary information requested in three of the requested categories did not exist.<sup>39</sup>

On 15 March 2018, the Requestor filed Request 18-2, seeking reconsideration of ICANN org’s determination not to produce Items No. 1-9, 12-16, and 18-21, which are discussed in detail below.

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<sup>35</sup> Request 17-3, available at <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>. See also Request 17-4, available at <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>. Request 17-4 was filed in conjunction with DotMusic Limited.

<sup>36</sup> Board Action Regarding Request 17-3, available at <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>; Board Action Regarding Request 17-4, available at <https://www.icann.org/resources/board-material/resolutions-2017-10-29-en#1.a>.

<sup>37</sup> See DIDP Request No. 20180115-1; Request 18-2 Ex. 1, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>38</sup> Response to DIDP Request No. 20180115-1; Request 18-2 Ex. 6, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>39</sup> Response to DIDP Request No. 20180115-1 at Items 10, 11, and 17.

On 23 March 2018, the Requestor submitted a letter to the BAMC concerning the CPE Process Review.<sup>40</sup> Among other things, the Requestor asserted that “[i]f transparency and accountability are indeed the Board’s objectives, then” ICANN org should disclose all of the documents requested in the 2018 DIDP Request.<sup>41</sup> The Requestor asserted that if ICANN org did not agree to all of its conditions, “the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.”<sup>42</sup>

On 5 April 2018, the Requestor reiterated that, “[i]n order to provide ICANN with further substantive comments on the CPE Process Review,” the Requestor “must have” the items it sought in its 23 March 2018 letter, including the documents requested in the 2018 DIDP.<sup>43</sup>

#### **E. Relief Requested.**

The Requestor asks the BAMC to “disclose the documents requested under Request Nos. 1-9, 12-16, and 18-21.”<sup>44</sup>

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN org complied with established ICANN policies in responding to the DIDP Request, and particularly with respect to Item Nos. 1-9, 12-16, and 18-21; and
2. Whether ICANN org complied with its Core Values, Mission, and Commitments.<sup>45</sup>

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<sup>40</sup> 23 March 2018 letter from A. Ali to ICANN Board at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

<sup>41</sup> *Id.* at Pg. 4-5.

<sup>42</sup> *Id.* at Pg. 5.

<sup>43</sup> Attachment 1, 5 April 2018 email from R. Wong to ICANN org.

<sup>44</sup> Request 18-2, § 9, at Pg. 18.

<sup>45</sup> Request 18-2.

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>46</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>47</sup> Where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>48</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>49</sup>

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<sup>46</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>47</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>48</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>49</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

On 16 April 2018, the BGC determined that Request 18-2 is sufficiently stated and sent Request 18-2 to the Ombudsman for review and consideration.<sup>50</sup> The Ombudsman thereafter recused himself from this matter.<sup>51</sup> Accordingly, the BAMC has reviewed Request 18-2 and all relevant materials, and issues this Recommendation.

## **B. The DIDP.**

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN org's operational activities. In that regard, ICANN org publishes many categories of documents on its website as a matter of course.<sup>52</sup> In addition, the DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already publicly available, is made available to the public unless there is a compelling reason for confidentiality.<sup>53</sup>

The DIDP was developed through an open and transparent process involving the broader community. It was the result of an independent review of standards of accountability and

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<sup>50</sup> Ombudsman Action Regarding Request 18-2, Pg. 1-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

<sup>51</sup> *Id.*, Pg. 1.

<sup>52</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>53</sup> *Id.*

transparency within ICANN org, which included extensive public comment and community input.<sup>54</sup>

Neither the DIDP nor ICANN org’s Commitments and Core Values supporting transparency and accountability obligate ICANN org to make public every document in ICANN org’s possession. The DIDP is limited to requests for *documentary information* already in existence within ICANN org that is not publicly available. Requests for information are not appropriate DIDP requests. Moreover, ICANN org is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>55</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN org adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>56</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN org’s website].”<sup>57</sup>

The Nondisclosure Conditions identify circumstances for which ICANN org’s other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L.* Independent Review

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<sup>54</sup> See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>; and <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

<sup>55</sup> *Id.*

<sup>56</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>57</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws).

They include, among others:

- i. Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents (Internal Deliberative Process);
- ii. Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications (Constituent Deliberative Process);
- iii. Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations (Personal Privacy);
- iv. Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement (Nondisclosure Agreements);
- v. Confidential business information and/or internal policies and procedures (Confidential Business Information);
- vi. Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (Drafts); and
- vii. Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation (Privilege/Investigation).<sup>58</sup>

Notwithstanding the above, documentary information that falls within any of the Nondisclosure Conditions may still be made public if ICANN organization determines, under the

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<sup>58</sup> DIDP.

particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>59</sup>

**V. Analysis and Rationale.**

**A. ICANN org Adhered to Established Policies and Procedures in Responding to the DIDP Request.**

**1. The 2018 DIDP Response Complies with Applicable Policies and Procedures.**

The Requestor asserts that ICANN org should have disclosed the documentary information requested in Items No. 1-9, 12-16, and 18-21 because the Requestor believes that the public interest in disclosing these materials outweighs the potential harm of disclosure.<sup>60</sup> As a preliminary matter, the BAMC notes that the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the 2018 DIDP Response. Instead, the Requestor claims that ICANN org is “hiding behind” those Nondisclosure Conditions and, in the Requestor’s view, ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.<sup>61</sup> This represents a substantive disagreement with ICANN org’s discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. However, the BAMC has reviewed the 2018 DIDP Response and, for the reasons discussed below, concludes that the 2018 DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

In the course of evaluating Request 18-2, ICANN org conducted a review of the documents identified by FTI as part of its review and determined that those documents

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<sup>59</sup> *Id.*

<sup>60</sup> *See* Request 18-2.

<sup>61</sup> *Id.* § 6, at Pg. 10.



responsive to Items No. 1-9, 12-16, and 18-21 that were not already publicly available are subject to Nondisclosure Conditions and that the public interest in disclosure does not outweigh the harm that may be caused by disclosing the information, for the reasons discussed below. In the course of that review, ICANN org also confirmed that most of the documents do not relate to ICANN org's operational activities, and are therefore not appropriate subjects of DIDP requests.<sup>62</sup>

a. The Response to Items No. 1, 2, 4, 5, and 9 Complies with Applicable Policies and Procedures.

Items No. 1, 2, 4, 5, and 9 sought the disclosure of emails relating to the CPE process:

- All “[i]nternal e-mails among relevant ICANN [org] personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 1);
- All “[e]xternal e-mails between relevant ICANN [org] personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 2);
- All “100,701 emails, including attachments, in native format” provided to FTI by ICANN [org] in response to FTI’s request (Item No. 4);
- All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines” (Item No. 5); and
- All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff (Item No. 9).<sup>63</sup>

Consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, determined that certain of the documents responsive to the Items had

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<sup>62</sup> See DIDP.

<sup>63</sup> DIDP Request No. 20180115-1; Request 18-2 Ex. 1, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

already been published, and provided hyperlinks to the publicly available documents.<sup>64</sup> ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information;
- Drafts; and
- Privilege/Investigation.<sup>65</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>66</sup>

The Requestor does not challenge the applicability of these Nondisclosure Conditions. Indeed, as ICANN org noted in the 2018 DIDP Response, the Requestor *conceded* that the materials FTI relied on in the CPE Process Review reflect “ICANN’s deliberative and decision-making process concerning the CPE process,”<sup>67</sup> and are therefore subject to the first Nondisclosure Condition identified above.

According to the Requestor, because “ICANN [org] has already disclosed [the requested] documents to FTI as part of its review rather than keep them confidential,” ICANN org cannot

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<sup>64</sup> See 2018 DIDP Response, at Pg. 2-11.

<sup>65</sup> 2018 DIDP Response, at Pg. 9-13.

<sup>66</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 9-13.

<sup>67</sup> DIDP Request No. 20180115-1, at Pg. 3.

now justify withholding them from the public.<sup>68</sup> As discussed further in Section V.B.1. below, ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>69</sup> ICANN org explained in the DIDP Response that it sought consent from the CPE Provider to release the information, but as the Requestor recognized in Request 18-2, the CPE Provider has not agreed to ICANN org’s request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. Nevertheless, the Requestor claims that ICANN org should still be required to produce these documents.<sup>70</sup> But, the Requestor points to no policy, procedure, or other commitment undertaken by ICANN that would require it to breach its contractual obligations to accommodate the Requestor.

The Requestor claims that the “DIDP Request only asked for documents provided to FTI and, as such, ICANN has already disclosed those same documents to FTI as part of its review rather than keep them confidential.”<sup>71</sup> This argument completely ignores the fact that the CPE Provider consented to the disclosure of certain materials to FTI—and itself produced the CPE working papers to FTI. By contrast, the CPE Provider has *not* consented to disclosure of – and indeed has threatened litigation if ICANN org were to disclose – the same materials to the public. Accordingly, ICANN org remains bound by its contractual commitment to maintain confidentiality of the materials unless and until the CPE Provider agrees to the release of the

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<sup>68</sup> Request 18-2, § 6, at Pg. 10-11.

<sup>69</sup> New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>70</sup> Request 18-2, § 6, at Pg. 10-11.

<sup>71</sup> *Id.* § 6, at Pg. 10.

information. For the reasons discussed in Section V.B.1 below, ICANN org’s policies and procedures do not require ICANN org to breach its contract with the CPE Provider to accommodate the Requestor’s request.

Additionally, because outside counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN org, all of the disclosures were privileged (as discussed below) unlike the public disclosure that the Requestor seeks. The Requestor indirectly concedes the applicability of the Attorney-Client Privilege Nondisclosure Condition to ICANN org’s internal emails (Item No. 1) when it argues that “ICANN [org] deliberately chooses to hide behind waivable privileges,” and “ensured that critical items . . . be withheld based on the attorney-client privilege.”<sup>72</sup> Regardless of this concession, the BAMC concludes that ICANN org applied the Nondisclosure Condition consistent with the DIDP when it determined that the attorney-client privilege applied here. As ICANN org explained in the 2018 DIDP Response, ICANN org’s outside counsel—not ICANN org—retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN org.<sup>73</sup> Accordingly, FTI’s working materials, including ICANN’s internal emails, are protected by the attorney-client privilege.

b. The Response to Items No. 6-8 and 12-13 Complies with Applicable Policies and Procedures.

Items No. 6-8, 12, and 13 sought the disclosure of the CPE Provider’s work product:

- All draft CPE Reports concerning .GAY, both with and without comments (Item No. 6);

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<sup>72</sup> Request 18-2, § 6, at Pg. 11.

<sup>73</sup> 2018 DIDP Response, at PG. 11, citing FTI’s CPE Process Review Reports, each indicating that they were “Prepared for Jones Day,” ICANN org’s outside counsel; and citing *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013).

- All draft CPE Reports concerning .GAY in redline form, and/or feedback or suggestions given by ICANN [org] to the CPE Provider (Item No. 7);
- All draft CPE Reports reflecting an exchange between ICANN org and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey” (Item No. 8);
- All of the “CPE Provider’s working papers associated with” dotgay’s CPE (Item No. 12); and
- “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets” (Item No. 13).<sup>74</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, determined that certain of the documents responsive to the Items had already been published, and provided hyperlinks to the publicly available documents.<sup>75</sup> ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy (Items No. 12 and 13 only);
- Nondisclosure Agreements;
- Drafts; and
- Privilege/Investigation.<sup>76</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm, as discussed further below.<sup>77</sup>

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<sup>74</sup> DIDP Request No. 20180115-1.

<sup>75</sup> See 2018 DIDP Response, at Pg. 16-20.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 13.

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, it is clear that ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

c. The Response to Items No. 3 and 14-16 Complies with Applicable Policies and Procedures.

Items No. 3 and 14-16 sought the disclosure of FTI’s work product in the course of the CPE Process Review:

- The “list of search terms” provided to ICANN org by FTI “to ensure the comprehensive collection of relevant materials” (Item No. 3);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN [org] personnel” (Item No. 14);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel” (Item No. 15); and
- FTI’s investigative plan used during its independent review (Item No. 16).<sup>78</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, that certain of the documents responsive to the Items had already been published, and provided hyperlinks to the publicly available documents.<sup>79</sup> ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Drafts; and

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<sup>78</sup> DIDP Request No. 20180115-1.

<sup>79</sup> See 2018 DIDP Response, at Pg. 14-15.

- Privilege/Investigation.<sup>80</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm, as discussed further below.<sup>81</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

d. The Response to Items No. 18-21 Complies with Applicable Policies and Procedures.

Items No. 18-21 sought the disclosure of correspondence and documents relating to the CPE Process Review and its scope:

- All communications between ICANN org and FTI regarding FTI’s independent review (Item No. 18);
- All communications between ICANN org and the CPE Provider regarding FTI’s independent review (Item No. 19);
- All communications between FTI and the CPE Provider regarding FTI’s independent review (Item No. 20); and
- All documents and communications regarding the scope of FTI’s independent review (Item No. 21).<sup>82</sup>

Consistent with the DIDP Response Process, ICANN org identified documents responsive to Items No. 18-21, determined that certain of the documents responsive to the Items

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.* at Pg. 9-21.

<sup>82</sup> DIDP Request No. 20180115-1.

had already been published, and provided hyperlinks to the publicly available documents.<sup>83</sup>

ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information; and
- Privilege/Investigation (Items No. 18 and 21 only).<sup>84</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm, as discussed further below.<sup>85</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

**2. ICANN Org Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**<sup>86</sup>

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>86</sup> Information subject to these Nondisclosure Conditions are not appropriate for

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<sup>83</sup> See 2018 DIDP Response, at Pg. 21-22.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 21.

<sup>86</sup> DIDP.



disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN org must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>87</sup> In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in the 2018 DIDP Response.

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in Items No. 1-9, 12-16, and 18-21. Instead, the Requestor asserts that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.<sup>88</sup> According to the Requestor, the public interest in disclosing the requested documents stems from the fact that ICANN is “ask[ing] everyone affected by the [CPE Process Review] Reports to accept their conclusions without question, even where there are clear problems and contradictions contained within the reports.”<sup>89</sup> The Requestor claims that the “clear problem[.]” is that the Dot Registry IRP Panel concluded that there was “a close nexus between ICANN staff and the CPE Provider,” “in clear contrast to FTI.”<sup>90</sup> The Requestor claims that it cannot “analyze whether ICANN unduly influenced the [CPE Provider] without the underlying documents.”<sup>91</sup> The Requestor’s claims do not support reconsideration.

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<sup>87</sup> *Id.*

<sup>88</sup> Request 18-2, § 6, at Pg. 10-11, § 8, at Pg. 17.

<sup>89</sup> *Id.*, § 6, at Pg. 10.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

The Board’s decision to initiate the CPE Process Review was in part in response to issues raised in the Dot Registry IRP Panel Declaration.<sup>92</sup> The Dot Registry IRP Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be “intimately involved in the [CPE] process.”<sup>93</sup> At the same time, the Panel emphasized that the Panel was “not assessing whether ICANN staff or the [CPE Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook].”<sup>94</sup> In response, the Board undertook serious consideration of the Panel’s comments concerning how ICANN org may have interacted with the CPE provider and the CPE reports, and directed ICANN org to undertake the CPE Process Review.<sup>95</sup>

To be sure, the Board did *not* direct that the CPE Process Review come to one conclusion over another and the Requestor has provided no evidence to the contrary. Instead, FTI was retained to assess—and reach its own conclusions concerning—three issues: (1) ICANN org’s interactions with the CPE Provider; (2) the way the CPE Provider applied the CPE criteria; and (3) the research referenced in the CPE Reports placed on hold. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. Accordingly, the Requestor’s belief that the conclusions in the CPE Process Review Reports are inconsistent with earlier analyses undertaken under different circumstances (such as the Dot Registry IRP) is no more than that—a belief—and it is immaterial. The Requestor provides no evidence to support this claim, because there is none. This baseless belief does not justify requiring ICANN org to permit the Requestor to

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<sup>92</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>93</sup> Dot Registry IRP Panel Declaration, ¶ 93, at Pg. 35, *available at* <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>94</sup> *Id.* ¶ 152, at Pg. 60.

<sup>95</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

conduct its own re-evaluation of the CPE process or of the CPE Process Review Reports, and does not demonstrate that the public interest in disclosing the documents FTI reviewed in the course of the CPE Process Review outweighs the harm that may come from disclosing those documents. This argument does not support reconsideration.

The Requestor next argues that the documents at issue in Request 18-2 “are given even greater import because . . . the CPE Provider has not agreed to disclose the documents and has threatened litigation.”<sup>96</sup> The Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure.

The Requestor also argues that ICANN org “failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.”<sup>97</sup> This argument fails because ICANN org *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>98</sup> There is no policy or procedure requiring that ICANN org to provide *additional* justification for nondisclosure.<sup>99</sup> Further, ICANN org explained why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. For example, ICANN org explained that the draft CPE reports and FTI’s notes of interviews of CPE Provider personnel reflected the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports and the Personal Information of CPE Provider personnel, two categories

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<sup>96</sup> Request 18-2, § 6, at Pg. 10 (internal quotation marks and citations omitted).

<sup>97</sup> *Id.*, § 6 at Pg. 10-11.

<sup>98</sup> 2018 DIDP Response at Pg. 9-22.

<sup>99</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

of information for which ICANN org is contractually obligated to maintain confidentiality.<sup>100</sup> Accordingly, reconsideration on this basis is not warranted.

Relatedly, the Requestor asserts that rather than state compelling reasons for nondisclosure, ICANN org “deliberately cho[o]ses to hide behind waivable privileges as an excuse to not disclose the documents.”<sup>101</sup> The Requestor claims that because ICANN org’s outside counsel retained FTI, “ICANN [org] ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.”<sup>102</sup>

As an initial matter, the Requestor provides no basis—because there is none—for its unfounded assertions that: (1) ICANN org relied on outside counsel to “ensure[.]” that documents would not be subject to public disclosure “based on the attorney-client privilege loophole,” or (2) the documents in question “could expose both ICANN and the CPE Provider” of some unidentified wrong.

Second, the Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the 2018 DIDP Request.<sup>103</sup> No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor’s request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason not to disclose certain documents.<sup>104</sup>

Third, the Requestor’s desire that ICANN org waive that privilege does not demonstrate that the public interest in disclosure outweighs the harm that may occur if privileged materials

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<sup>100</sup> See 2018 DIDP Response at Pg. 12-17, 20-22. ICANN org also explained why the attorney-client privilege and the Nondisclosure Condition protecting documents whose disclosure might prejudice an internal investigation applied to certain of the items requested. *Id.* at Pg. 11-12.

<sup>101</sup> Request 18-2, § 6, at Pg. 11.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> DIDP Nondisclosure Conditions.

are disclosed. Weakening the attorney-client privilege by forcing a client—here, ICANN org—to waive that privilege at the request of a third party like the Requestor poses a significant threat to ICANN org’s ability to trust that its future communications with counsel will be protected, and therefore undermines ICANN org’s ability to communicate candidly with counsel.<sup>105</sup> This potential harm outweighs the public interest in disclosing privileged materials. The BAMC notes that it is a fundamental principle of law that the invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. The BAMC therefore rejects the Requestor’s assertion that the attorney-client privilege is merely a “loophole” that ICANN org sought to take advantage of here, and its suggestion that ICANN org’s invocation of the privilege indicates that ICANN org had anything to hide. Accordingly, reconsideration is not warranted on these grounds.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because “ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology.”<sup>106</sup> Initially, the Requestor is incorrect in its assertion that ICANN org determined that applicants would not be interviewed or submit materials in the course of the CPE Process Review. FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports.<sup>107</sup> FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the

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<sup>105</sup> *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”).

<sup>106</sup> Request 18-2, § 6, at Pg. 11.

<sup>107</sup> See, e.g. Scope 2 Report, at Pg. 3-9, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

investigation because neither the Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants.<sup>108</sup> Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.<sup>109</sup> Despite that conclusion, FTI ensured that it understood the concerns applicants raised in reconsideration requests and IRP proceedings concerning the CPE process.<sup>110</sup> The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one. Accordingly, the Requestor has not demonstrated that FTI's decision not to interview or accept materials submitted by CPE applicants supports the public interest in disclosing the documents that FTI did consider in the course of the CPE Process Review. Reconsideration is not warranted on this basis.

**B. ICANN Org Adhered to its Commitments and Core Values in Responding to the 2018 DIDP Request.**

**1. ICANN Org Adhered to its Commitments to Accountability, Openness, and Transparency in Responding to the 2018 DIDP Request.**

The Requestor asserts that ICANN org's determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments to "operate to the maximum extent feasible in an open and transparent manner,"<sup>111</sup> "apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for

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<sup>108</sup> *Id.* at Pg. 8.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at Pg. 8.

<sup>111</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

discriminatory treatment,”<sup>112</sup> and “[r]emain accountable to the Internet community through mechanisms defined in [the] Bylaws that enhance ICANN’s effectiveness.”<sup>113</sup>

As a preliminary matter, the BAMC notes that the DIDP was developed as the result of an independent review of standards of accountability and transparency, which included extensive public comment and community input. The DIDP—and particularly the Nondisclosure Conditions—balance ICANN org’s commitments to transparency and accountability against its competing commitments and obligations.<sup>114</sup> This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the *Amazon EU S.A.R.L.* Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.<sup>115</sup>

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy

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<sup>112</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(v).

<sup>113</sup> *Id.*, Art. 1, § 1.2(a)(vi); Request 18-2, § 6, at Pg. 9-10. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-2. *See* Request 18-2, § 6, at Pg. 9. The BAMC considers Request 18-2 under the Bylaws in effect when the Requestors submitted the reconsideration request which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor’s claims under the 22 July 2017 version of the Bylaws.

<sup>114</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

<sup>115</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.”<sup>116</sup>

A critical competing Core Value is ICANN org’s Core Value of operating with efficiency and excellence<sup>117</sup> by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>118</sup> Confidential Information includes “all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information.”<sup>119</sup> The materials that the CPE Provider shared with ICANN org, ICANN org’s counsel, and FTI reflect the CPE Provider’s Confidential Information, including confidential information relating to its operations, products, and services (i.e., its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees’ personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.<sup>120</sup>

Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain

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<sup>116</sup> ICANN Bylaws, 22 July 2017, Art. 1, Section 1.2(c).

<sup>117</sup> ICANN Bylaws, Art. 1, Section 1.2(b)(v).

<sup>118</sup> New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>119</sup> <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>120</sup> See, e.g., Response to Request 20150312-1 at Pg. 2, available at <https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf>.



information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org's request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org's contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN org's contract with the CPE Provider.<sup>121</sup> Accordingly, the Requestor's generalized invocations of ICANN org's commitments to transparency, openness, and accountability do not support reconsideration here.

Additionally, the Requestor asserts that part of ICANN org's response to Item No. 3, in which ICANN org noted that the Scope 1 Report "includes the information responsive to" Item No. 3.<sup>122</sup> The 2018 DIDP Response explained that

the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN org with a list of search terms and requested that ICANN org deliver to FTI all email (including attachments) from relevant ICANN org personnel that 'hit' on a search term. The search terms were [designed] to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN org and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website."<sup>123</sup>

The Requestor claims that this is "the exact same language" that the Requestor used in Item No. 3, which sought "[t]he 'list of search terms' provided to ICANN by FTI 'to ensure the

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<sup>121</sup> See DIDP (Nondisclosure Condition for "[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement").

<sup>122</sup> 2018 DIDP Response, at Pg. 13.

<sup>123</sup> *Id.* at Pg. 13-14, *quoting* Scope 1 Report at Pg. 10.

comprehensive collection of relevant materials,”<sup>124</sup> and “an obvious attempt to side-step the disclosure of any responsive documents.”<sup>125</sup>

ICANN org’s response did more than repeat the language in Item No. 3. First, as quoted above, ICANN org noted that the Scope 1 Report had explained that the search terms “included the names of ICANN org and CPE Provider personnel who were involved in the CPE process,” along with “words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website.”<sup>126</sup> Additionally, ICANN org explained that “documents responsive to Item [No.] 3” were not appropriate for disclosure because they were subject to certain Nondisclosure Conditions, and ICANN org determined that the public interest in disclosing documents reflecting the search terms did not outweigh the harm that may be caused by such disclosure.<sup>127</sup> For the reasons explained above, ICANN org’s determination concerning the disclosure of such documents was consistent with established policy and ICANN org’s commitments and core values. Accordingly, this argument does not support reconsideration.

## **2. ICANN Org Adhered to its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the 2018 DIDP Request.**

The Requestor asserts that “[p]ursuant to [international] laws and conventions, there is an ‘international minimum standard of due process as fairness-based on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.”<sup>128</sup> The Requestor argues that the CPE Process Review did

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<sup>124</sup> 2018 DIDP Request.

<sup>125</sup> Request 18-2, § 6, at Pg. 9.

<sup>126</sup> 2018 DIDP Response at Pg. 13-14, *quoting* Scope 1 Report at Pg. 10.

<sup>127</sup> *Id.* at Pg. 14, 22.

<sup>128</sup> Request 18-2, § 6, at Pg. 8 (quoting Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law,” 23 *Duke J. of Comparative and Int’l L.* 411, 422 (2013))

not provide due process to the Requestor because “it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available.”<sup>129</sup>

The BAMC recognizes ICANN org’s commitment to conform with relevant principles of international law and conventions.<sup>130</sup> Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>131</sup> ICANN org established the DIDP in support of its commitment to transparency and accountability and with extensive community input. That procedure and those specific commitments are not outweighed by ICANN org’s general commitment to conform with relevant principles of international law. ICANN org was not required to establish a DIDP, but instead did so voluntarily. Accordingly, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment conform to relevant principles of international law.

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. “[T]he fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.<sup>132</sup> Accordingly, the Board was not obligated to direct ICANN org to undertake the

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and Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 179 (Mar. 15, 2017)).

<sup>129</sup> *Id.*

<sup>130</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

<sup>131</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

<sup>132</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

CPE Process Review at all, let alone set a particularly wide or narrow scope for it or for the disclosure of supporting materials to the Requestor.<sup>133</sup>

The Requestor’s conclusory statement that because it did not have access to every document underlying the CPE Process Review Reports, the Requestor has been deprived of due process, does not support reconsideration. The Requestor asserts—based entirely on speculation—that the CPE Process Review Reports are “the one piece of significant evidence relevant to its Request 16-3.”<sup>134</sup> The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-3.

Further, when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>135</sup> The Board noted that the Requestor’s arguments and challenges to the merits of the report issued by the CPE Provider in connection with its community application for the .GAY gTLD will be addressed in connection with Request 16-3,<sup>136</sup> and, additionally the BAMC is required to act “on the basis of the public written record, including information submitted by the Requestor.”<sup>137</sup> Accordingly, there is no basis for the Requestor’s assumption that the CPE Process Review Reports are “the one piece of significant evidence relevant to . . . Request 16-3,” particularly in light of the volume of materials

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<sup>133</sup> For the same reasons, the Board was not required to “seek . . . input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation,” or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. See 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>134</sup> Request 18-2, § 6, at Pg. 8.

<sup>135</sup> See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>136</sup> See *id.*

<sup>137</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(p).

submitted by the Requestor in support of Request 16-3.<sup>138</sup> This argument does not support reconsideration.

For all of the reasons discussed above, reconsideration is not warranted.

## **VI. Recommendation.**

The BAMC has considered the merits of Request 18-2, and, based on the foregoing, concludes that ICANN org did not violate ICANN’s Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the 2018 DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 18-2.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical, in which case, the BAMC “shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request.”<sup>139</sup> Request 18-2 was submitted on 15 March 2018. To satisfy the thirty-day target deadline, the BAMC would have to have acted by 14 April 2018. Due to scheduling, the first opportunity that the BAMC has to consider Request 18-2 is 5 June 2018, which is within 90 days of receiving Request 18-2.<sup>140</sup>

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<sup>138</sup> Request 18-2, § 6, at Pg. 8.

<sup>139</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

<sup>140</sup> *Id.*

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-2**

Requestor<sup>1</sup> submits this rebuttal to the BAMC’s Recommendation on Request 18-2 (the “**Recommendation**”), which affirms the 24 February 2018 DIDP Response<sup>2</sup> and raises several issues that Requestor will address in this rebuttal. Particularly, Requestor will explain that Reconsideration Request 18-2 (“**Request 18-2**”) is properly within the scope of the reconsideration process, ICANN must recognize and apply international principles, and that both the DIDP Response and Recommendation violate ICANN’s commitments and core values.

### **I. Requestor Properly Sought Reconsideration of the DIDP Request**

The Recommendation asserts that Request 18-2 is outside the scope of the reconsideration process. According to the BAMC, Request 18-2 “represented a substantive disagreement with ICANN org’s discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted.”<sup>3</sup> However, the Bylaws do not limit reconsideration requests to contesting “the *process* by which ICANN reached that conclusion.”<sup>4</sup> Rather, reconsideration requests provide for the review of “*actions or inactions* that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies)” and adversely affect the requestor.<sup>5</sup> In accordance with the Bylaws, Requestor submitted Request 18-2 to seek reconsideration of ICANN’s decision to deny certain document requests in the DIDP Response—an action that contradicts ICANN’s Commitments and Core Values. Request 18-2 is thus properly within the purview of the reconsideration request process pursuant to ICANN’s Bylaws.

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in Reconsideration Request 18-2. *See* Exhibit 33, Reconsideration Request 18-2 (Mar. 15, 2018).

<sup>2</sup> *See* Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018).

<sup>3</sup> Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 13.

<sup>4</sup> *Id.*

<sup>5</sup> Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 4, § 4.2(c)(i) (emphasis added).

## II. ICANN Must Recognize and Apply the Principal of Due Process

The ICANN Bylaws require that ICANN comply with principles of international law, which includes due process. The BAMC is attempting to circumvent the Bylaws by arguing in the Recommendation that can ignore international legal principles because (1) ICANN can establish its own accountability mechanisms<sup>6</sup> and (2) ICANN’s commitment to transparency outweighs its commitment to principles of international law. However, the ICANN Bylaws require that ICANN “carry[] out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes.”<sup>7</sup> This “puts principles of international law first, before ... local law and ICANN’s Bylaws.”<sup>8</sup> Resultantly, “any principles enshrined in California law, ICANN’s Articles ... and/or ICANN’s Bylaws will only apply to the extent that they are fully compatible with international law.”<sup>9</sup>

Hence, the BAMC’s arguments are untenable based on ICANN’s own Bylaws. While ICANN established its own corporate accountability mechanisms, its Bylaws require that these mechanisms comply with international legal principles. The principles of transparency and accountability thus cannot supersede these international principles pursuant to ICANN’s Bylaws; rather international legal principles “serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted”—including ICANN’s accountability mechanisms.<sup>10</sup> As such, neither of the BAMC’s excuses for ignoring the international principle of due process hold water.

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<sup>6</sup> The Recommendation refers to due process as a “[c]onstitutional protection” or a “constitutional right.” Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 32. The BAMC may be confusing the *constitutional right* to due process, contained in the United States Constitution and applicable to the American government, with the international *principle* of due process.

<sup>7</sup> Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a).

<sup>8</sup> Exhibit 35, Flip Petition, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. 40.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at p. 39.

### III. ICANN’s DIDP Response Violates its Commitments and Core Values

Although the BAMC argues otherwise,<sup>11</sup> ICANN clearly violated its Commitments and Core Values by rejecting the disclosure of certain requested documents.<sup>12</sup> The DIDP Response is nontransparent, unfair, and a blatant attempt by ICANN to avoid accountability for its actions. It must therefore be reconsidered by the ICANN Board.

#### A. ICANN Must Acknowledge its Commitment to Transparency

The DIDP Response violates the principle of transparency. This principle “is one of the essential principles in ICANN’s creation documents, and its name reverberate[s] through its Articles and Bylaws.”<sup>13</sup> ICANN’s Articles of Incorporation (“**Articles**”) commit it to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>14</sup> ICANN’s Bylaws reaffirm this commitment,<sup>15</sup> dedicate an entire article on transparency,<sup>16</sup> and emphasize that one of ICANN’s Core Values is to “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”<sup>17</sup> The DIDP is “[a] principal element of [this] approach to transparency and information disclosure.”<sup>18</sup> As the Recommendation states,

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org’s approach to transparency and information disclosure is the commitment to make

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<sup>11</sup> Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 34.

<sup>12</sup> See Exhibit 33, Reconsideration Request 18-2 (Mar. 15, 2018), pp. 7-10.

<sup>13</sup> Exhibit 31, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101.

<sup>14</sup> Exhibit 36, ICANN Articles of Incorporation (Oct. 3, 2016), § 2.III.

<sup>15</sup> Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a) (“ICANN must operate in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”).

<sup>16</sup> See *id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

<sup>17</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>18</sup> Exhibit 15, ICANN Documentary Information Disclosure Policy (last visited June 29, 2017).



publically available a comprehensive set of materials concerning ICANN org’s operational activities.<sup>19</sup>

Despite its commitments to transparency, the DIDP Response rejected the DIDP Request in violation of the principle of transparency.

The Recommendation blames its lack of compliance with the principle of transparency on the CPE Provider, which refuses to let ICANN disclose documents containing alleged “Confidential Information.”<sup>20</sup> First, ICANN cannot be allowed to avoid compliance with its own Bylaws through third-party contracts with provisions violating its Core Values; this renders the principle of transparency impotent. Second, the contractually protected “Confidential Information”<sup>21</sup> from the CPE Provider cannot possibly encompass every requested document. Requestor has, for instance, asked that ICANN disclose its “communications regarding the scope of FTI’s independent review.”<sup>22</sup> This request, and many others in the DIDP Request, does not concern the CPE Provider’s confidential information.<sup>23</sup> ICANN is clearly using its agreement with the CPE Provider to avoid disclosing most, if not all, of the requested documents—regardless of whether the agreement actually applies to the request.

ICANN further justifies its lack of transparency by claiming that some of the requested documents from the DIDP Request are subject to the DIDP’s Nondisclosure Conditions.<sup>24</sup> However, instead of identifying the responsive documents and applicable Nondisclosure Conditions, both the DIDP Response and Recommendation just list several Nondisclosure

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<sup>19</sup> Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 9.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Id.*

<sup>22</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), pp. 5-6.

<sup>23</sup> Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 29 (defining “Confidential Information” as “materials that the CPE Provider shared with ICANN org, ICANN org’s counsel, and FTI”).

<sup>24</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018).

Conditions that apparently apply to several categories of requested documents.<sup>25</sup> In doing so, ICANN has prevented Requestor from properly challenging the applicability of the Nondisclosure Conditions to the responsive documents; it is impossible to challenge whether a condition applies to a document that the Requestor *cannot even identify*.<sup>26</sup> Somehow, both ICANN and the BAMC expect Requestor to understand how these conditions apply to unknown documents and to simply accept that these documents are apparently covered by the Nondisclosure Conditions.

Even if the Nondisclosure Conditions applied to these unidentified responsive documents, they should still be disclosed because the public interest clearly outweighs any potential harm.<sup>27</sup> There is a clear public interest in both ICANN's adherence to its transparency obligations and the content of the requested documents. ICANN's Articles and Bylaws recognize the public's interest in transparency.<sup>28</sup> The public is specifically interested in the requested documents because they will permit the public to evaluate the FTI Reports.<sup>29</sup> The FTI Reports will affect how the BAMC determines community gTLD applicants' pending reconsideration requests, and could have affected the CPE process.<sup>30</sup> The validity of the FTI Reports is therefore significant to Requestor, the other community gTLD applicants, and the entire Internet community—all of which will be

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<sup>25</sup> See *id*; see also Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018).

<sup>26</sup> The Recommendation misquotes Requester's 'concession' that "the materials FTI relied on in the CPE Process Review reflect 'ICANN's deliberate and decision-making process concerning the CPE process.'" *Id.* at p. 15. The DIDP Request states that "[f]ull disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process." Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), p. 3 (emphasis added). There is no concession in this statement; rather, it affirms that disclosure of the documents will protect ICANN's decision-making process.

<sup>27</sup> Exhibit 15, ICANN Documentary Information Disclosure Policy (last visited June 29, 2017) (stating that "[i]nformation that falls within any of the conditions ... may still be made public if ICANN determined, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure").

<sup>28</sup> Exhibit 36, ICANN Articles of Incorporation (Oct. 3, 2016), § 2.III; Exhibit 11, ICANN Bylaws (July 22, 2017), Art.1, § 1.2(a).

<sup>29</sup> The current CPE evaluation process has disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants. See Exhibit 20, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016).

<sup>30</sup> See Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017) (identifying seven other gTLD strings with pending reconsideration requests).

indisputably affected by the ICANN's decisions on the community gTLDs. Yet, ICANN is refusing to disclose the documents in the DIDP Request.

This public interest is compounded by the clear flaws with FTI's independent review.<sup>31</sup> The Recommendation attempts to cure FTI's deficiencies, asserting that "the Requestor's belief that the conclusions in the [FTI] Reports are inconsistent with earlier analyses undertaken under different circumstances (such as the Dot Registry IRP) is not more than that—a belief—and it is immaterial."<sup>32</sup> This assertion is both materially incorrect and mischaracterizes the *Dot Registry* IRP Declaration. The *Dot Registry* IRP Panel did not conclude that "ICANN staff *appeared to be* 'intimately involved in the [CPE] process.'"<sup>33</sup> Rather, it concluded that the "EIU *did not act on its own* in performing the CPEs that are the subject of this proceeding. ICANN staff *was* intimately involved in the process."<sup>34</sup> FTI, without accounting for the verbal communications between ICANN and the CPE Provider, arrived at the opposite conclusion.<sup>35</sup> This inconsistency is not the Requestor's belief but a supported fact. The public has a right to analyze the inconsistencies in the CPE Process Review Reports, which will affect ICANN's determination on several community applications and therefore impact the public interest.

These public interests warrant disclosure of the requested documents because they clearly outweigh the harm of disclosure. The DIDP Response simply stated that "there are no circumstances at this point in time for which the public interest in disclosing the information

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<sup>31</sup> The FTI Reports are both methodologically flawed and substantively incomplete. Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018); Exhibit 37, Letter from the EBU to dotgay LLC (Mar. 6, 2018); Exhibit 38, DotMusic Limited' Correspondence and Analysis of Community Priority Evaluation Process & FTI Reports to ICANN Board (Feb. 2, 2018).

<sup>32</sup> Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 23.

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> Exhibit 31, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 93.

<sup>35</sup> Exhibit 2, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 3 ("FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.").

outweighs the harm that may be used by the requested disclosures.”<sup>36</sup> The BAMC has identified a single harm in its Recommendation: the “[w]eakening [of] the attorney-client privilege.”<sup>37</sup> This harm, however, does not apply to all of the document requests as ICANN stated that *only* “FTI’s draft and working materials are protected by the attorney-client privilege under California law.”<sup>38</sup> Requestor not only requested “FTI’s draft and working materials” but also other categories of documents—such as “[a]ll documents and communications regarding the scope of FTI’s independent review.”<sup>39</sup> These other categories of materials are, by ICANN’s own definition, not covered by the attorney-client privilege; the strong public interest in disclosure thus outweighs the general claim that there is an unidentified “harm” in disclosing them.

Even the documents that ICANN alleges are covered by the attorney-client privilege should be disclosed to the public. *First*, ICANN alleges that it will suffer significant harm if a third party can to force it to waive the attorney-client privilege because this threatens ICANN’s “ability to trust that its future communications with its counsel will be protected.”<sup>40</sup> This allegation is irrelevant. Requestor cannot force ICANN to waive the attorney-client privilege through the DIDP; Requestor is instead asking ICANN to voluntarily waive that privilege in order to comply with its own transparency obligations. In fact, Requestor is not even asking ICANN to disclose its communications with Jones Day but to disclose communications with other ICANN personnel, the CPE Provider, and FTI.<sup>41</sup> Therefore, the harm that ICANN alleges—the weakening of the attorney-client privilege by threatening ICANN’s confidential communications with Jones Day—is not applicable to the DIDP Request. *Second*, ICANN cannot be permitted to hide behind the

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<sup>36</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 22.

<sup>37</sup> Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 26.

<sup>38</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 11.

<sup>39</sup> See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), pp. 3-6.

<sup>40</sup> Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 26.

<sup>41</sup> See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), pp. 3-6.

attorney-client privilege to avoid its disclosure obligations. Requestor has asked ICANN to publically disclose documents that were created *before Jones Day retained FTI*, which ICANN sent to FTI as part of its independent review. ICANN is now attempting to use the attorney-client privilege to avoid disclosing documents that do not involve Jones Day and any of its agents.

Thus, in rejecting the DIDP Request, ICANN has not adhered to the balancing test inherent in its own Nondisclosure Conditions as (1) there is little harm in disclosing the documents, and (2) there is significant public interest in disclosing the requested documents. ICANN cannot avoid disclosing documents on FTI's independent review without violating its own stated Commitment to and Core Value of transparency.

**B. ICANN Must Act Fairly in Administering the DIDP**

ICANN also violated its Commitment to and Core Value supporting fairness. ICANN has specifically agreed that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to ... (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies.<sup>42</sup>

It further committed to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>43</sup>

ICANN's DIDP Response is therefore in clear violation of its commitment to fairness. The CPE process is currently facing a myriad of complaints regarding its unfair treatment of community gTLD applicants because it has disproportionately treated community gTLD

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<sup>42</sup> Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 3, § 3.1.

<sup>43</sup> *Id.* at Art. 1, § 1.2(a)(v).

applicants by inconsistently and unfairly applying criteria between applicants.<sup>44</sup> FTI was supposed to conduct an independent evaluation of this discriminatory treatment, but instead performed a methodologically and substantially flawed review.<sup>45</sup> Yet, ICANN continues to unfairly exclude community applicants and the Internet community from critically examining the independent review process to verify or dispute FTI's conclusions, even though the applicants will be and are affected by the FTI Reports and the improperly administered CPE. Instead of welcoming additional commentary and contributions to the review of an important gTLD process, ICANN has instead restricted interested parties' access to information in a blatantly unfair decision that keeps affected applicants uninformed and raises several red flags regarding the integrity of the independent review itself. ICANN's actions therefore contravene the principle of fairness, and its dedication to neutrality, objectiveness, integrity, and openness.

### **C. ICANN Cannot Avoid Accountability for Its Decisions**

ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community in violation of its Commitments and Core Values. Through its Bylaws, ICANN has committed itself to "[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness."<sup>46</sup> It has adopted two significant Core Values that reaffirm this Commitment: (1) "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the

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<sup>44</sup> See Exhibit 20, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016); Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018); Exhibit 37, Letter from the EBU to dotgay LLC (Mar. 6, 2018); Exhibit 39, Letter from Dechert LLP on behalf of DotMusic to the BGC (Dec. 15, 2016); Exhibit 38, DotMusic Limited' Correspondence and Analysis of Community Priority Evaluation Process & FTI Reports to ICANN Board (Feb. 2, 2018).

<sup>45</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018); Exhibit 38, DotMusic Limited' Correspondence and Analysis of Community Priority Evaluation Process & FTI Reports to ICANN Board (Feb. 2, 2018),.

<sup>46</sup> Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a)(vi).

bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”<sup>47</sup> and (2) “[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.”<sup>48</sup>

The DIDP Response, and the Recommendation supporting it, contradicts these Commitments and Core Values. By denying the DIDP Request, ICANN is operating in near complete secrecy regarding FTI’s independent review and the basis for the FTI Reports. This prevents ICANN from operating in a fully effective manner as its secrecy prevents a large community from analyzing the integrity of the independent review, and forces community applicants to continually seek information from ICANN through DIDP requests. By retaining its nontransparent stance, ICANN is avoiding all accountability for its acceptance of FTI’s flawed independent review in violation of its Commitments and Core Values.

#### **IV. Conclusion**

Therefore, it is clear that ICANN failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC further perpetuated this violation by recommending that the Board deny Request 18-2. In addition to the reasons stated in the Request 18-2,<sup>49</sup> the Board should grant Request 18-2 and produce the requested documents on FTI’s independent review.

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Arif Hyder Ali

\_\_\_\_\_ 20 June 2018

Date

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<sup>47</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>48</sup> *Id.* at Art. 1, § 1.2(b)(v).

<sup>49</sup> Exhibit 33, Reconsideration Request 18-2 (Mar. 15, 2018).

**REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.2c**

**TITLE:** **Consideration of Reconsideration Request 18-3**

**Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 18-3.

Attachment A is [Reconsideration Request 18-3](#), submitted on 30 March 2018.

Attachment B is the [Ombudsman Action on Request 18-3](#), dated 24 April 2018.

Attachment C is the [Ombudsman's Substantive Evaluation of Request 18-3](#), submitted 4 May 2018.

Attachment D is the [BAMC Recommendation on Request 18-3](#), issued 5 June 2018.

Attachment E is the [Attachment 1 to the BAMC's Recommendation on Request 18-3](#).

Attachment F is the [Attachment 2 to the BAMC's Recommendation on Request 18-3](#).

Attachment G is the [Requestor's Rebuttal to the BAMC's Recommendation on Request 18-3](#), submitted on 20 June 2018.

Attachment H is an Email from M. Chulani to the Requestor, dated 13 March 2018.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 10 July 2018

Email: amy.stathos@icann.org



## **Reconsideration Request Form**

Version of 1 October 2016

ICANN's Board Governance Committee (BGC) is responsible for receiving requests for review or reconsideration (Reconsideration Request) from any person or entity that believes it has been materially and adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (c) **One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.**

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

**1. Requestor Information**

**Name: Astutium Ltd**

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

**2. Description of specific action you are seeking to have reconsidered.**

Letter 21/March/2018

NOTICE OF TERMINATION OF REGISTRAR ACCREDITATION AGREEMENT

IANA 1471 (Astutium Ltd)

[https://www.icann.org/uploads/compliance\\_notice/attachment/1013/serad-to-golding-21mar18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1013/serad-to-golding-21mar18.pdf)

**3. Date of action/inaction:**

Action taken 21/March/2018 as delivered by Fedex 27/March and posted online

**4. On what date did you become aware of the action or that action would not be taken?**

22/March from a post on facebook about it. Followed by numerous telephone calls and the actual letter.

**5. Describe how you believe you are materially and adversely affected by the action or inaction:**

Astutium Ltd believe the decision to terminate our RAA is based on faulty data, misunderstandings and an overall failure of ICANN staff/policies/procedures.

The defamatory claims published on ICANN website impact the our reputation of our business and the action itself represents a risk to both Astutium Ltd and more importantly to our registrants

**6. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Registrants are already contacting us concerned about the potential impact on

their business and domain names should the action proceed.

## **7. Detail of the ICANN Action/Inaction – Required Information**

### **Provide the Required Detailed Explanation here:**

ICANN action in terminating the RAA with Astutium Ltd

Astutium Ltd believe proceeding with this action would have demonstrable harm to registrants, that the publishing of defamatory provably false claims of contract breach are damaging the reputation of Astutium Ltd, and that faults in the compliance processes applied should be urgently addressed

Astutium Ltd believe the action is unwarranted and based on faulty premises such that it is unreasonable and grounds for reconsideration

A total of six reasons are provided in the termination notice, and is the view of Astutium Ltd that each of those claimed breaches are patently false and primarily relate to the faults/failings of ICANN Compliance Staff and Processes.

## **8. What are you asking ICANN to do now?**

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

Astutium Ltd would like to see

- the RAA termination cancelled
- the processes/staff which led to the termination letter reviewed
- the libelous claims now published on your website updated with an apology/retraction

## **9. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.**

Failure to reverse the action will result in loss of business reputation,

Financial loss incurred in replacing direct-accreditation registrations with reseller arrangements which will take a significant amount of time and the expense of legal action against ICANN and ICANN staff

Disruption to our and our clients' business due to uncertainty over their domains.

Specifics of the RAA termination breach claims being disputed are ...

**Claim 1:**

*failure to take reasonable steps to investigate and correct claimed Whois inaccuracies regarding the domain name as required by Section 3.7.8 of the RAA*

**Response:**

No breach has occurred, no such failure has taken place. All aspects of 3.7.8 have been complied with despite ICANN's clear faults/failings/falacies in ticket [~FVW-625-17043]

**Details:**

On 20/December ICANN Compliance Staff Nick Axelrod-McLeod forwarded a WHOIS complaint report which contained significant errors (errors in the report, not errors in the whois data) - a total of 9 items (although some duplicated) were reported as needed investigation.

As a registrar we are tasked to *"take reasonable steps to investigate that claimed inaccuracy"* - the report was read, the claimed inaccuracies were clearly and obviously faults in the ICANN reporting process and it was replied by email to that effect.

Rejecting incorrect reports is as per agreement between the Registrars and Maguy Serad who is on-record at ICANN Meetings stating that complaints forms will be manually vetted, and that the practice of just forwarding them onto registrars had ceased.

Despite Maguys' assurances (which have been given on multiple occasions), and instead of using this as an opportunity to review their processes/improve staff training as well as to comply with their primary stated aim of compliance through cooperation, ICANN staff decided to dismiss our concerns

**Conclusion:**

Astutum Ltd firmly believe this should have been handled by the "ICANN Issue" section as explained

<https://www.icann.org/en/system/files/files/presentation-compliance-registrar-outreach-13mar18-en.pdf>

Page 14 "the complaint should not have been sent to contracted party due to ICANN error; or internal ICANN process needs to be completed before the Compliance process can continue"

However, as a responsible registrar, we chose to contact the registrant and advise them that we had received a complaint. Subsequent to that contact, updates have been made by the registrant to their domain registration data, although we now expect to receive a complaint from them regarding the illegal use of their personal data as scraped from the public whois, as we regularly do in these circumstances.

Astutum Ltd therefore posit that no breach has occurred, that all contractual requirements have been met, that we have gone above-and-beyond in our duties regarding whois data, and that claim#1 is defamatory and libellous.

**Additional:**

ICANNs demands for copies of communications to "demonstrate compliance" are both unreasonable and unnecessary. Compliance is a *state* not an event, and is easily checked, it does not require "demonstration", and should be well within the capabilities for a "Compliance Department" to check - in this case doing something as simple as a WHOIS.

Further, the exporting of private communications is potentially illegal, plus when combined with ICANNs recent and historical security incidents/data-breaches should not be something regularly demanded or taken lightly.

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**Claim 2:**

*failure to validate and verify Whois contact information, as required by Whois Accuracy Program Specification*

**Response:**

No breach has occurred, no such failure has taken place. All applicable parts of WAPS are handled automatically.

**Details:**

This is a misunderstanding of ICANN staff of responses to queries, of the technologies involved, and of the processes undertaken by (largely) automated systems as employed by the majority of registrars (and registries).

Validation of client submitted data is done prior to acceptance of that data, and manual "eyeballing" of the data not a general requirement. In the event of certain specific data being updated (and subject to it not already having been verified on other domains) automated processes are then invoked as needed in accordance with 1.f

**Conclusion:**

ICANN Compliance Staff demands that data is checked manually are beyond the WAPS requirements (excepting where necessary as part of WAPS 4 in the event of failure of other methods) and not applicable in this case, but are an attempt by ICANN staff to impose their own beyond-contract additions to policy

Astutum Ltd therefore posit that no breach has occurred, that all contractual requirements have been met, and that the actual requirements of the WAPS have been all been complied with, and therefore that claim#2 is a staff misinterpretation.

**Additional:**

Despite Astutum Ltd compliance with the WAPS, it should be made clear that sections of WAPS are clearly out-of-scope for ICANN and attempts to extend the remit to cover "*corresponding customer / account holder*" (rather than being limited to domain-name specific data) should be examined and challenged.

Further, the inclusion of implementation methodologies (WAPS 1f) in contract are not in accordance with normal ICANN policy which generally specifies the "what" but not the "how".

---

**Claim 3:**

*failure to maintain and make available to ICANN registration data and records*

**Response:**

No breach has occurred, no such failure has taken place. All appropriate records are maintained and ICANN staff are well aware that Astutium Ltd keep accurate records from previous interactions/tickets.

**Details:**

Astutium Ltd as a UK based company are subject to UK law and (currently at least) EU law regarding data retention, disclosure and export. Following the highly publicised dismissal of the SafeHarbour agreements and questions about the reliability and authenticity of its replacement, there are limitations on what personal data (and copies of emails, recordings of telephone calls and related items are all considered personal data or contain personal data) can be exported.

The EU Data Protection Directive 95/46/EC regulates the export of personal data outside of the EEA and states that there should be no transfers of personal data to countries outside the EEA unless the recipient country ensures 'adequate' protection for data subjects and their personal data.

The US is not currently listed as a territory that meets the requirements of adequate safeguards, although limited organisations within the US meet the Privacy Shield requirements

**Conclusion:**

ICANN are not currently listed as having implemented or become compliant/certified with Privacy Shield [https://www.privacyshield.gov/participant\\_search](https://www.privacyshield.gov/participant_search)

If ICANN wish to have copies of records, they can be provided once you achieve the Privacy Shield certification. If instead ICANN wish to examine our records, they are more than welcome to do so at our offices, so that no data-export needs to take place. If that is not acceptable or practical, then remote viewing from an acceptable location which meets EU safeguard requirements is also possible.

Astutium Ltd remain open to discussion about appropriate anonymisation and data access as per the RAA, however to-date we are not aware of anything other than ICANNs demands for data/records to which they are not entitled or to which we are not legally able to export to the US.

Astutium Ltd therefore posit that no breach has occurred, that all our legal requirements have been met, that the records are available, that they can be inspected (subject to appropriate safeguards), and therefore that claim#3 is an unwillingness on the part of ICANN staff to act in good faith as regards 3.4.3

**Additional:**

The EU are in the process of enacting additional legislation regarding data-export/sharing which when passed will mean that no records will be shareable with ICANN unless you open and staff offices within the EuroZone by any EU based registrar.

---

**Claim 4:**

*failure to provide domain name data in the specified response format, as required the RDS (Whois) Specification*

**Response:**

No breach has occurred, no such failure exists.

**Details:**

ICANN provided details of WHOIS output format errors in ticket [~EDF-547-7109].

These were investigated and it appeared to be a combination of: some templating errors; an earlier missed "advisory" which introduced new/additional requirements; conflict between the example data provided at <https://www.icann.org/resources/pages/registry-agreement-raa-rdds-2015-04-27-en> and the specifications of that data the same document refers to

A deadline for completion was given by ICANN of 2/March to update the output

**Conclusion:**

From the extensive details provided by ICANN in the ticket it was possible to examine the data, the specification and compare to various examples of thin and thin registries/registrar as well as the multiple conflicting advisories to determine that some mistakes had previously been made and that further work/investigation/testing was needed

Typing mistakes (Created rather than Creation for example) were clearly our fault and fixed accordingly.

Other examples required more in-depth analysis, for example RDS/WHOIS specification states that date/time should be in RFC 3339 format [ that time should be local with offset (as we displayed it) ] yet the ICANN ticket demanded that times be converted to Zulu/UTC which is not what the specification linked RFC says.

After careful consideration of the impact, development work and standards as published, determined that changes could and should be made, so development resources were dedicated to the task of updating the whois outputs.

Initial rollout of the fixes occurred and ICANN were informed of this through the ticket 26/February well in advance of the deadline, however the response was ...

*"Although your registrar's Whois format continues to be out of compliance with the requirements of the Whois Format requirements of the Registration Data Directory Service (Whois) Specification (RDDS) of the 2013 Registrar Accreditation Agreement (RAA), this ticket*

*has been closed because the issue is now being addressed in the notice of breach issued to your registrar on 27 February 2018"*

Astutium Ltd therefore posit that no breach has occurred, that all necessary changes to meet staff requirements (which go above and beyond the documented specification) were met in advance of the arbitrary deadline, that the statement of "continues to be out of compliance" indicates they did not check, and that claim#4 is thus invalid.

**Additional:**

The process of introducing through the "backdoor" new contractual requirements through "advisories" is one that Registrars and Registries are particularly concerned about. There is a very real difference between clarification of something which is ambiguous or uncertain, and imposing (potentially onerous) new requirements which have not been agreed but make their way into contracts and therefore "compliance" are an ongoing issue, and that changes to requirements/specifications/etc should remain the purview of PDPs not staff

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**Claim 5:**

*failure to include a link in its registration agreement to its renewal fees*

**Response:**

No breach has occurred, no such failure has taken place.

**Details:**

Links to our domain registration, renewal, transfer, post-expiry, redemption and other fees are on EVERY PAGE of our website and are clearly on the domain availability/check page and have been available from the "legal" pages (such as registration agreements) for a number of years.

**Conclusion:**

Unlike the majority of domain registrars, Astutium Ltd have always been upfront and clear about our pricing, displaying such items clearly and obviously on our website, so that registrants can make informed choices.

Since inception it remains company policy to make pricing information available at the earliest possible opportunity (although due to potential customisation options, sometimes only a range is possible to show until later in the order process) and have no hidden or surprise fees.

The Astutium domain checker page which forms an integral part of the order flow clearly has the pricing displayed, and is not hidden in any way (for example behind a login/paywall) as is common within the industry. Although pricing is shown EX-VAT (tax) as is standard in EU B2B pricing, unlike many registrars we don't "add on" ICANN fees or other undisclosed items post-order

The link to the price list page(s) is at the bottom of the earliest waybackmachine version of the registration agreement page from 2013

<https://web.archive.org/web/20130920073852/https://www.astutium.com/legal/domain-registration-rules.php>



and continues to be there today

Astutium Ltd therefore posit that no breach has occurred, that the link along with all associated data/pricing is easily available to any/all who wish to see it, and therefore that claim#5 is malicious falsehood

**Additional:**

A "quick check" of the websites of the largest registrars show that we appear to be unique in showing all pricing information without signup/order (and in many cases it is not available even after signing up).

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**Claim 6:**

*failure to publish a correspondence address on Astutium's website*

**Response:**

No breach has occurred, no such failure has taken place.

**Details:**

Astutium Ltd website at <https://www.astutium.com> complies fully with UK legislation (Companies Act, Distance Selling Regulations) and EU legislation (E-Commerce Directive) as well as following best practices for any business. These require us to publish our registered/trading address, which we have always done.

Astutium Ltd *want* current, previous and future registrants to contact us, this is why the website has a "Contact" link at the top of every page, has telephone numbers on every page, contains multiple methods of communication (email, telephone, ticket, fax, post) listed and clearly shows our address at the bottom of every page.

A quick check with a major search engine responds with 1382 pages of our website indexed and **\*EVERY SINGLE ONE OF THOSE\*** has our address on it.

**Conclusion:**

Astutium Ltd are very concerned about this claim as it appears to be a deliberate attempt to discredit the business rather than being anything remotely factual.

Further, ICANN are well aware of our address (having delivered this notice to us by Fedex) and that following your data-breach and closedown of RADAR, that ICANN staff were involved in the update of our details in radar appx June 2017

To claim that you do not know our address, or that we do not publish that information on our website, or that we do not make it as absolutely easy to find us as we possibly can utterly beggars the imagination

Astutium Ltd therefore posit that no breach has occurred, and that claim#6 is published by icann purely for defamation purposes

**Additional:**

Having moved offices a few times in the last 20-or-so years, we have had to update our contact information more than once, and still maintain postal redirects from some locations, such that even if a registrant had recently emerged from a cave with only a 5 year old hand written rolodex, no access to the internet to look at the website, and wrote to us to renew their domain, the letter would still arrive at our current location !

**10. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**10a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.**

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <https://www.icann.org/resources/pages/accountability/reconsideration-en> .

**Terms and Conditions for Submission of Reconsideration Requests**

A handwritten signature in black ink, appearing to be 'RSG' with a flourish.

28/March.2018

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Signature

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Date

**Subject:** Re: [Reconsideration Request] Reconsideration Request 18-3  
**Date:** Tuesday, April 24, 2018 at 5:46:38 PM Pacific Daylight Time  
**From:** Herb Wayne (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman

Reconsideration Request 18-3

Pursuant to Article 4, Section 4.2(l), I am accepting consideration of Request 18-3.

Best regards,

Herb Wayne  
ICANN Ombudsman

[https://www.icann.org/ombudsman\[icann.org\]](https://www.icann.org/ombudsman[icann.org])  
[https://www.facebook.com/ICANNombudsman\[facebook.com\]](https://www.facebook.com/ICANNombudsman[facebook.com])  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

[https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org])

Community Anti-Harassment Policy

[https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en\[icann.org\]](https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org])

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Monday, April 23, 2018 at 1:15 PM  
**To:** Herb Wayne <herb.waye@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Request 18-3

Dear Herb,

ICANN recently received the attached reconsideration request (Request 18-3), which was submitted on 30 March 2018 by Astutum Limited (Requestor) seeking reconsideration of ICANN organization's decision to terminate the Requestor's 2013 Registrar Accreditation Agreement (RAA) with ICANN organization dated 5 October 2014 (RAA). The termination, which was effectuated pursuant to Section 5.5.4 of the RAA, was scheduled to become effective 20 April 2018, but that date has been postponed while Request 18-3 is under consideration.

The Board Accountability Mechanisms Committee (BAMC) has determined that Request

18-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 18-3 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 18-3 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 18-3.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

### Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3

This is the first substantive evaluation of a Request for Reconsideration by the ICANN Ombudsman. In October of 2016, ICANN adopted new bylaws, expanding the role of the Ombudsman to include a new, formal role with regard to Requests for Reconsideration (Bylaws, Article 4, Section 4.2). The subsequently amended ICANN Bylaws (amended as of July 22, 2017: "Bylaws") state:

4.2(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

and

4.2(l)(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

In my new formal role under the current Bylaws, I have reviewed and considered Reconsideration Request 18-3. Previously, I have reviewed several Reconsideration Requests submitted to me for my consideration since the new bylaws went into effect; I have had to recuse myself for each under the following ICANN Bylaw:

4.2(l)(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Before turning to my substantive evaluation of the present Reconsideration Request 18-3, I want to make some observations about the Ombudsman's new dual role in the ICANN community, now that it has obligations both formal (substantive evaluations of Reconsideration Requests) and informal (evaluating complaints by members of the ICANN community about unfair treatment by ICANN staff, its Board, or a constituent body). The Bylaws obligate me to play both roles, and to balance the two; and I cannot, as I understand the Bylaws, wear both hats at once.

The Ombudsman's Charter, and principal role before the new Bylaws were passed (and now under them) is to provide an informal accountability mechanism using a "fairness" standard for issues and complaints arising within the ICANN community that relate to treatment by ICANN staff, Board members, or members of the numerous constituent bodies under the multi-stakeholder model; according to the Bylaws Article 5:

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.

My principal function is to operate informally, to evaluate complaints of unfairness, and to resolve disputes. Certain challenges are presented by the addition of the new “formal” role for the ICANN Ombudsman; before providing a substantive evaluation of a Reconsideration Request (such as the present one), the Ombudsman must determine whether recusal is appropriate. The standard for my recusal is this: if I have been asked to evaluate a complaint informally (under the fairness standard and pursuant to Bylaws Article 5), then (after review of the Request) I will recuse myself whenever a Reconsideration Request appears on its face to be the same (or a reasonably related) matter. If I have done an investigation or mediated informally under my principal informal Article 5 role, then I have deemed myself to have “taken a position”—and my recusal is therefore warranted.

After review of a Reconsideration Request, the Ombudsman is required to choose between recusal (including where Ombudsman conduct itself is part of the Reconsideration Request, for example, or where I, while performing my role under the Bylaws have taken a position related to the Request), and providing to the Board Accountability Mechanisms Committee (BAMC) a substantive evaluation of the Request, as I am doing here. To be clear to the community in the future: where I have been involved informally, I will be loathe to tread formally, and I will consistently recuse myself in such situations from providing a substantive evaluation of a Reconsideration Request.

I want to stress that my formal involvement in a Reconsideration Request, when I am not obligated to recuse myself, will be done in a professional and impartial manner, with the reasonable assistance of dedicated outside counsel. And I want to stress that per the Bylaws Article 5, the Office of the Ombudsman remains open to any member of the community, whether or not they have filed a Reconsideration Request, or may have reason to become a Requestor in the future (under the Bylaws, Article 4).

In the present Reconsideration Request, 18-3, my involvement with the Requestor, Astutium Limited (“Astutium”) has been limited to advising the Requestor of the available ICANN accountability mechanisms; I have not taken any position in the matter that forms the substance of this Request. Hence, I have not recused myself here, and now offer the following substantive evaluation of Reconsideration Request 18-3.

A Requestor, under the relevant provision of the Bylaws (4.2(c)), can bring a Request concerning an action or inaction as follows:

Section 4.2. RECONSIDERATION...(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction

("Reconsideration Request") to the extent that the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

Put succinctly, did an official action (or inaction) contradict or violate ICANN's Mission or established policy? Or, was such action taken or refused without consideration of material information, or was it the result of reliance on false or inaccurate relevant information? In providing the BAMC a "substantive evaluation" of a Request for Reconsideration, the Ombudsman is tasked to look "substantively" at what is included in the Request itself, and of course at the actions (or inaction) the Requestor seeks Reconsideration of; and while the Bylaws are silent as to my investigative powers under Article 4, Article 5 does empower the Ombudsman, and gives me "the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies in responding to enable an informed evaluation of the complaint" (made to me by community members under Article 5). The Ombudsman shall

"(d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint."

While a Reconsideration Request is *not* a "complaint" brought (to me) under Article 5, nothing in Article 4 purports to limit my ability to have "access" (while maintaining confidentiality) "to all necessary information and records from ICANN staff and constituent bodies" (as set forth in Article 5). Under the Bylaws, Article 4, I am also entitled (within resource constraints) to "seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task." Since it seems patently obvious (at least, to me) that the Bylaws would not obligate me to make an "uninformed" evaluation of a Request for Reconsideration, and since my formal role under Article 4 does not constrain my internal rights of access under my "charter" (set forth in Article 5), I have sought and will seek outside assistance and, where warranted, access to "necessary information and records," so that my evaluation of the substance of Reconsideration Requests may be sufficiently informed. The BAMC should not want, and the new Bylaws do not task the Ombudsman with providing, *uninformed* evaluations of Requests for Reconsideration. My substantive evaluations are constrained by reasonableness, and aided by expert advice as reasonably required.

My task is *not* to be a referee or an umpire or a judge—I cannot grant or deny a Request. I am more like a neutral network commentator observing from high above the field (in a modest broadcast booth) the action below: trying to describe it and “evaluate” it, and then to comment substantively from the unique perch granted to me by my Charter and the relevant Bylaws. From this vantage, I think it useful, at least in regard to this Request, to look closely at what the Requestor, Astutium, “ask(s) ICANN to do now.”

The Request states three things Astutium wants ICANN to do; these are to have

- 1) the RAA (Registrar Accreditation Agreement) termination cancelled;
- 2) the processes/staff which led to the termination letter reviewed; and
- 3) the libelous claims now published on your website updated with an apology/retraction.

This Reconsideration Request will be the very first such Request (as far as I know) to be addressed by the Board (and BAMC) relating to the termination of a Registrar Accreditation Agreement for Breach.

### **Termination of the Requestor’s RAA**

Requestor executed a Registrar Accreditation Agreement (“RAA”) (the 2013 version) on October 5<sup>th</sup>, 2014.

<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>

On February 27<sup>th</sup>, 2018, a notification of breach under RAA section 5.5.4 was sent to the Registrar, following the procedure for notifications set forth in RAA 7.6.

[https://www.icann.org/uploads/compliance\\_notice/attachment/1003/serad-to-golding-27feb18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1003/serad-to-golding-27feb18.pdf) (the “Breach Notice” or “Notice of Breach”)

The breaches set forth above in the Breach Notice are, in the main, breaches of RAA contractual provisions relating to Whois data (one breach involves the obligation of the Registrar to keep an accurate physical address on file, presumably in part so that when a breach *is* noticed, physical delivery of such Notice may be made to the Registrar):

#### **“REGISTRAR INFORMATION SPECIFICATION**

Registrar shall provide to ICANN the information specified below, which shall be maintained in accordance with Section 3.17 of the Agreement. ...

7. Correspondence address for the Registrar.\* This address will be used for contractual purposes, and the Registrar must be able to accept notices and service of legal process at this address. No Post Office boxes are allowed.”

Some of the breaches (relating directly to incorrect and inaccurate Whois data) set forth in the Breach Notice (Noticed Breaches) were brought to the attention of ICANN Contractual Compliance by third-parties. There is nothing set forth in Request 18-3,



which, upon review of the relevant Notices of Breach and Termination and the process whereby these were generated and sent, makes me think other than that Contractual Compliance acted according to their own published policies, and followed established procedures in terms of their investigation of the Noticed Breaches. Assuming the facts set forth in those Notices are true, Contractual Compliance acted strictly in accordance with the terms of the RAA and their well-established and clear policies and procedures.

Contractual Compliance, per its policies and procedures, examined the Requestor Registrar's Whois data, found it lacking and inaccurate, and sent notices and attempted to contact the Registrar as provided by the RAA, in an effort to get Astutium to cure. On February 27<sup>th</sup>, after review by a competent and trained Contractual Compliance team, a Breach Notice was sent to the Registrar by email (to the Registrar's contact, at an astutium.com email address), as well as by Fax and by Courier. There is nothing in the Request that suggests that the Requestor did not timely receive the Breach Notice.

The determination of breaches by, and the notification to Astutium of such, were made under agreed-upon terms of the RAA and established ICANN Contractual Compliance policies; Astutium was given 21 days to cure the breaches set forth in the Breach Notice.

Astutium could have cured the Noticed Breaches. At the very least, they could have made efforts to cure the Noticed Breaches. According to Contractual Compliance, Astutium not only made no effort to cure the Noticed Breaches, they made no effort to contact Contractual Compliance at all. In effect, they "went dark" during the 21-day cure period (set forth in the RAA). Now Astutium, per this Request, wants ICANN's Board to cancel the termination of the RAA and Astutium's Registrar rights thereunder.

According to Contractual Compliance, and this is a purely factual matter, but I have no reason to doubt their veracity, Astutium did not cure, did not respond; thus, upon completion of the 21-day cure period, after a determination made by an experienced and trained Contractual Compliance team that no timely cure had been made (or even attempted so far as they could see) a Notice of Termination was sent to Astutium on March 21<sup>st</sup>, 2018. (The counting for the 21-day cure period under the RAA, by policy, begins the day after the Breach Notice is sent—in this instance, the Breach Notice was sent February 27<sup>th</sup>, 2018, and the Notice of Termination was sent 22 days later on March 21<sup>st</sup>, 2018; it was "TRANSMITTED VIA ELECTRONIC MAIL, FACSIMILE, AND COURIER" to the addresses Contractual Compliance had on file per the RAA.)

[https://www.icann.org/uploads/compliance\\_notice/attachment/1013/serad-to-golding-21mar18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1013/serad-to-golding-21mar18.pdf)

This present Request for Reconsideration (18-3) was filed by Astutium on March 30<sup>th</sup>, 2018. The termination process of the Requestor's RAA has been suspended by ICANN pending the resolution of this Request by the BAMC and, ultimately, the Board itself.

### **The Processes of Contractual Compliance Staff That Led to the Termination Notice**

The second action requested by Requestor is a review of "the processes/staff which led to the termination letter": neither the processes themselves, nor ICANN staff itself are *actions* or *inactions*. Compliance policies and their "approach" to enforcement are here:

<https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#31>

Those processes and procedures, up to and after the Referral to Enforcement, along with the mechanisms in the RAA itself (the “Contract” of which Compliance in this instance is responsible for) were followed rigorously and impartially. No special treatment was given to Astutium. All of its “termination breach claims” that it seeks to dispute in the Request are related directly to the Notice of Termination, which it received, as stated in the Request, on March 27<sup>th</sup>, 2018.

I was given access to ICANN’s Contractual Compliance team and discussed with them their procedures, processes and approach, including the treatment of the Requestor.

The actions taken by Contractual Compliance appear to me to be strictly in accordance with the mutually-agreed-upon terms of the RAA, and their established procedures and policies as set forth in part above. The Request for Reconsideration seems telling, to me, in that it first and foremost seeks to stop the termination of Requestor’s RAA (and reverse the termination process currently suspended owing to consideration and review of the Request itself). That action (pending termination) and the actions leading up to it (investigating a potential breach, whether brought to the attention of Contractual Compliance by third-party complaint, internal monitoring, or by audit; determining a breach; noticing a breach or breaches; and then noticing termination to the contracted party per the terms of the RAA in effect)—none of these actions “contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).”

On the contrary, it is the Mission and Commitment of ICANN and the stated policy of its (aptly named) Contractual Compliance staff, to *ensure* that ICANN agreements, here the RAA, and any contracted party to an RAA, are, in fact, *in compliance*. Enforcement of the agreements to which it is a party—and especially the RAAs, which are in some ways the life’s blood of ICANN—is a “Core Value.” ICANN lives by its contracts, and endeavors to enforce its RAAs fairly, impartially and rigorously—and has done so here.

Contractual Compliance did not make its determinations and take the actions that culminated in the Notice of Termination (and the pending termination process) without considering all material information available (other than such information, material or otherwise, that could have been—but for whatever reason was not—submitted to it by Astutium), and ICANN staff did not rely on false or inaccurate relevant information.

Contractual Compliance were made aware of a breach (breaches) of Requestor’s RAA relating to Astutium Whois data, they investigated and determined those breaches in fact existed, they timely and properly notified Astutium, they sent a Breach Notice with ample time to cure; then Astutium did not respond to duly Noticed Breaches and did not cure said Noticed Breaches; indeed Astutium did not contact ICANN Contractual Compliance *at all*, as it might have done after receiving the Breach Notice from ICANN.

Requestor, in essence, seeks Reconsideration of the (pending) Termination of its RAA, which does not seem to me to be warranted as a remedy via the Reconsideration Request process under these circumstances: relevant actions by ICANN staff were

based on the material and relevant information available and not a result of reliance on false or inaccurate relevant information.

As for review of Contractual Compliance's actions and policies: Notice of Termination was properly sent after team investigation, due diligence was then done by Contractual Compliance, and it followed its procedures and policies and the "letter(s)" of the RAA.

### **Allegedly Libelous Claims (Publishing of the Notices of Breach and Termination)**

Finally, Requestor, perhaps because it believes itself righteously to be aggrieved by the actions/inactions of ICANN and its staff in regard to the alleged breaches and Notice of Breach, and the Notice of Termination based on the uncured breaches, seeks, in its final request, for an *updating* of "the libelous claims now published on your website...with an apology/retraction" by ICANN. While I agree in principle that libelous statements *would be* actions *not* in keeping with the "Mission, Commitments, Core Values and/or established ICANN policy(ies)" (to say nothing of the kind or quality of information considered in making such allegedly "libelous" statements), there is nothing in the published Notices of Breach or Termination that appears on its face or after inquiry to be *false*: Facts relating to the breaches were determined and vetted by experienced, well-trained teams in Contractual Compliance acting in their ordinary course per their published procedures and policies.

Since I serve the ICANN community, I will note that there were (and perhaps still are) other avenues available to Requestor other than requesting Reconsideration. First, the Requestor could have *cured* the Noticed Breaches: At the very least, they could have responded to and worked collaboratively with Contractual Compliance to make efforts towards curing some and eventually all of the breaches set forth in the Breach Notice.

Requestor could have, and could yet still, undertake the Dispute Resolution processes available in the RAA, Section 5.8: "Resolution of Disputes Under this Agreement." (<https://www.icann.org/en/system/files/files/approved-with-specs-27jun13-en.pdf>)

Requestor could have, and might perhaps still, file a Complaint with the newly established ICANN Complaints Office. [<https://www.icann.org/complaints-office>] This could lead to escalation of one or more of Requestor's issues to the ICANN CEO.<sup>1</sup>

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- <sup>1</sup> The ICANN Complaints Office is impartial and neutral; it researches, reviews and responds to unresolved operational matters regarding work delivered or promised by ICANN. The complaints office is an operational accountability mechanism for the organization and is subject to a process that is as transparent as possible so that all constituents can see what problems are being reported and how they are being addressed. "If there is disagreement regarding improvements between the Complaints Officer and relevant department executives, the issue is escalated to the Complaints Officer's supervisor and the ICANN CEO." <https://www.icann.org/complaints-office>

My substantive (and, to the degree made possible by my Charter, *informed*) evaluation of this Request, as ICANN's Bylaws require from the Ombudsman, is this: With regard to ICANN Contractual Compliance's determination, enforcement processes, the sent and published Notice of Breach of Requestor's RAA, the subsequently sent and published Notice of Termination of that RAA (following a contractual cure period during which no cure or contact with ICANN Contractual Compliance was made), along with the publishing in due course of factual information in the Breach and Termination Notices (as is ICANN's well-established, well-stated practice *and* policy, in the name of *transparency*), nothing Requestor has set forth in Request for Reconsideration 18-3 merits a recommendation by the BAMC or the Board to take any of the actions as requested by Requestor.

Requestor may wish to pursue other avenues, including the process of dispute resolution in the RAA, or filing a Complaint with the Complaints Office.

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-3  
5 JUNE 2018**

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The Requestor, Astutium Limited, seeks reconsideration of ICANN organization's decision to issue a Notice of Termination (Termination Notice) of the Requestor's 2013 Registrar Accreditation Agreement (RAA) with ICANN organization.<sup>1</sup> Specifically, the Requestor alleges that, in deciding to issue the Termination Notice, ICANN organization: (i) relied on faulty data and misunderstandings; and (ii) failed to adhere to applicable policies and procedures. The Requestor also alleges that ICANN organization published defamatory statements on its website that impacts the Requestor's business reputation. The Requestor asks that ICANN organization "cancel" the termination.

**I. Brief Summary.**

The Requestor entered into the RAA with ICANN organization on 5 October 2014. On 17 December 2017, ICANN organization's Contractual Compliance Team (Contractual Compliance) received a complaint concerning claimed WHOIS inaccuracies regarding the domain name <tomzink.com> (Complaint), which is registered with the Requestor. Consistent with its approach and process,<sup>2</sup> Contractual Compliance validated the Complaint to ensure that it was within the scope of the RAA and consensus policies before forwarding the Complaint to the Requestor. Thereafter, Contractual Compliance engaged in a series of discussions with the

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<sup>1</sup> Request 18-3, § 2, at Pg. 2, available at <https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-request-redacted-30mar18-en.pdf>.

<sup>2</sup> See Contractual Compliance Approach and Process webpage, available at <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en>.

Requestor through the Informal Resolution Process regarding the claimed WHOIS inaccuracies, but the Requestor did not resolve the issues raised in the Complaint.

Following unsuccessful informal resolution of the Complaint, on 27 February 2018, Contractual Compliance escalated the matter to the Formal Resolution Process<sup>3</sup> by sending the Requestor a Breach Notice resulting from the Requestor's failure to: (i) take reasonable steps to investigate and correct claimed WHOIS inaccuracies regarding the domain name <tomzink.com>; (ii) validate and verify WHOIS contact information; and (iii) maintain and make available to ICANN organization registration data and records relating to the Requestor's communications with the Registered Name Holder (RNH) of the domain name <tomzink.com>.<sup>4</sup>

The Requestor was to cure the deficiencies identified in the Breach Notice by 20 March 2018. The Requestor did not respond, despite several follow-up attempts by Contractual Compliance prior to the cure date.<sup>5</sup> Consistent with its Formal Resolution Process, Contractual Compliance then issued a Termination Notice on 21 March 2018 for failure to cure the issues raised in the Breach Notice.<sup>6</sup> The termination was scheduled to become effective 20 April 2018.

On 28 March 2018, the Requestor filed Reconsideration Request 18-3 (Request 18-3), seeking urgent reconsideration of ICANN organization's decision to issue the Termination Notice.<sup>7</sup> However, the Requestor failed to provide an explanation in Request 18-3 as to why the matter was urgent for consideration, as required under the Bylaws. As a result, ICANN organization afforded the Requestor the option of either supplementing its submission to explain

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<sup>3</sup> See *id.*

<sup>4</sup> Notice of Breach, at Pg. 1, available at [https://www.icann.org/uploads/compliance\\_notice/attachment/1003/serad-to-golding-27feb18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1003/serad-to-golding-27feb18.pdf).

<sup>5</sup> Notice of Termination, at Pg. 5, available at [https://www.icann.org/uploads/compliance\\_notice/attachment/1013/serad-to-golding-21mar18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1013/serad-to-golding-21mar18.pdf).

<sup>6</sup> See generally, Notice of Termination. See also Formal Resolution Process – General Guidelines, available at <https://www.icann.org/en/system/files/files/formal-resolution-07mar17-en.pdf>.

<sup>7</sup> See Attachment 2, at Pg. 1.

the urgency, or converting Request 18-3 into a reconsideration request under the normal reconsideration process.<sup>8</sup> The Requestor chose the latter option.<sup>9</sup>

Pursuant to the Bylaws, Request 18-3 was submitted to the Ombudsman, who issued his substantive evaluation on 5 May 2018.<sup>10</sup> The Ombudsman concluded that Request 18-3 did not warrant “a recommendation by the BAMC or the Board to take any of the actions as requested by Requestor.”<sup>11</sup>

The BAMC has considered Request 18-3 and all relevant materials, including the Ombudsman’s evaluation, and recommends that the Board deny Request 18-3 because: (i) ICANN organization complied with established policy(ies) when it issued the Termination Notice; (ii) ICANN organization did not rely on faulty data or misunderstandings when it issued the Termination Notice; and (iii) ICANN did not publish any defamatory statements concerning the Requestor on its website.

## **II. Facts.**

### **A. The RAA.**

On 5 October 2014, the Requestor and ICANN organization executed the RAA.<sup>12</sup> The RAA sets forth ICANN organization’s and the Requestor’s obligations regarding registrar accreditation.

Relevant to Request 18-3, the RAA requires the Requestor to “comply with the obligations specified in the Whois Accuracy Program Specification” (WAPS) to maintain and

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<sup>8</sup> *See id.*, at Pg. 2.

<sup>9</sup> *Id.*, at Pgs. 3-4.

<sup>10</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-evaluation-icann-ombudsman-request-04may18-en.pdf>.

<sup>11</sup> *Id.*, at Pg. 8.

<sup>12</sup> 2013 Registrar Accreditation Agreement, *available at* <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

confirm accurate contact information for its RNHs.<sup>13</sup> The Requestor is required to “take reasonable steps to investigate” any inaccuracies about which it is notified concerning the contact information associated with a Registered Name sponsored by the Requestor.<sup>14</sup> In those circumstances, WAPS requires the Requestor to verify or re-verify any incorrect information.<sup>15</sup> If, within 15 calendar days, the Requestor “does not receive an affirmative response from the [RNH] providing the required verification, [the Requestor] shall either verify the applicable contact information manually or suspend the registration.”<sup>16</sup>

The Requestor also is required to maintain “all written communications constituting registration applications, confirmations, modifications, or terminations and related correspondence with Registered Name Holders,” and must make such data available to ICANN organization upon reasonable notice.<sup>17</sup>

Finally, Section 5.5.4 of the RAA provides that ICANN organization can terminate the RAA before its expiration if the Requestor “fails to cure any breach of [the RAA] within twenty-one (21) days after ICANN gives [the Requestor] notice of the breach.”<sup>18</sup>

**B. The WHOIS Complaint and Contractual Compliance’s Informal Resolution Process with the Requestor.<sup>19</sup>**

On 17 December 2017, Contractual Compliance received the Complaint concerning WHOIS inaccuracies regarding the domain name <tomzink.com>, which is registered with the

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<sup>13</sup> RAA, § 3.7.8.

<sup>14</sup> *Id.*

<sup>15</sup> RAA, WAPS §§ 1, 4.

<sup>16</sup> *Id.*, §§ 4, 5.

<sup>17</sup> RAA, §§ 3.4.2.2; 3.4.3.

<sup>18</sup> *Id.* § 5.5.4.

<sup>19</sup> While communications between the contracted party and Contractual Compliance are kept confidential during the Information Resolution Process (as Contractual Compliance states in response to Frequently Asked Question No. 32), here, because the Requestor put at issue its communications by filing the Request with a complete record, and because the Bylaws require the BAMC and Board to rely upon public information in making their recommendation and determination, respectively, the communications between Contractual Compliance and the Requestor in the ticket will be made public in this instance.



Requestor.<sup>20</sup> Consistent with its process,<sup>21</sup> Contractual Compliance reviewed the Complaint, and confirmed that the claims implicated the Requestor's obligations set forth in the RAA.

Contractual Compliance then initiated the Informal Resolution Process by issuing the first compliance notice to the Requestor on 20 December 2018.<sup>22</sup> The Complaint in its entirety was attached to the first compliance notice.<sup>23</sup>

In the first compliance notice, Contractual Compliance requested that the Requestor provide the following information by 18 January 2018 to demonstrate compliance: (i) WHOIS inquiries the Requestor sent to the RNH and any responses; (ii) emails the Requestor sent to the RNH to verify the email addresses and any affirmative responses; (iii) confirmation of the actions taken by the Requestor in response to the WHOIS inaccuracies; and (iv) the Requestor's validation of the WHOIS data format if any of the data was updated during the course of the Requestor's investigation, or if the RNH changed.<sup>24</sup>

The Requestor responded on 5 January 2018 that the Complaint was "bogus," "incomplete," and "rubbish" and that "[n]o action [was] necessary."<sup>25</sup>

Contractual Compliance emailed the Requestor on 19 January 2018 that its response was incomplete, and that evidence of verification and validation of the Complaint was required.<sup>26</sup>

Contractual Compliance explained that verification "is the process by which a registrar confirms or corrects the accuracy of Whois data by contacting and receiving an affirmative response from

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<sup>20</sup> Attachment 1, FVW-625-17043: WHOIS Inaccuracy complaint re: tomzink.com, at Pgs. 36-38.

<sup>21</sup> See Contractual Compliance Approach and Process webpage, available at <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en>.

<sup>22</sup> Notice of Termination, at Pg. 4

<sup>23</sup> *Id.*; Attachment 1, at Pgs. 33-36.

<sup>24</sup> Attachment 1, at Pgs. 33-36

<sup>25</sup> *Id.* at Pgs. 30-31. See also Notice of Termination, at Pg. 4.

<sup>26</sup> Attachment 1, at Pgs. 28-30. See also Notice of Termination, at Pg. 4.

the [RNH]” and that validation “is the process by which a registrar ensures that the format of Whois data is consistent with standards.”<sup>27</sup>

On 24 January 2018, the Requestor responded stating only that it had contacted the registrant “and had them update/correct/check the records”; however, the Requestor did not provide the validation or verification information requested by Contractual Compliance.<sup>28</sup>

Contractual Compliance thereafter confirmed that the Requestor had updated the WHOIS information, but because the requested verification and validation information remained outstanding, Contractual Compliance again requested that it be provided.<sup>29</sup>

On 29 January 2018, the Requestor again refused to provide the requested information, claiming that Contractual Compliance failed to review the Complaint prior to commencing the contractual compliance process, and asked that Contractual Compliance escalate the issue to management.<sup>30</sup> On 31 January 2018, Contractual Compliance repeated its request that the Requestor provide evidence of validation and verification, to which the Requestor did not respond.<sup>31</sup>

On 8 February 2018, Contractual Compliance issued a second compliance notice to the Requestor, identifying the requirements for the Requestor to demonstrate compliance.<sup>32</sup>

On 10 February 2018, the Requestor responded to the second compliance notice. The Requestor stated that there was no requirement to demonstrate compliance; that it would not provide details of private communications with third parties; that it had already confirmed that

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<sup>27</sup> Attachment 1, at Pg. 28.

<sup>28</sup> *Id.*, at Pgs. 27-28.

<sup>29</sup> *Id.*, at Pgs. 25-27; Notice of Termination, at Pg. 4.

<sup>30</sup> Attachment 1, at Pg. 24.

<sup>31</sup> *Id.*, at Pgs. 21-24; Notice of Termination, at Pg. 4.

<sup>32</sup> Attachment 1, at Pgs. 18-21; Notice of Termination, at Pg. 4.

the inaccuracies in the Complaint had been corrected; and that no validation was done or required.<sup>33</sup>

On 15 February 2018, Contractual Compliance contacted the Requestor using the primary contact phone number and left a voicemail with the details of the Requestor's noncompliance; Contractual Compliance also attempted to contact the Requestor at the primary contact mobile number, but the call would not connect.<sup>34</sup> The Requestor did not respond.<sup>35</sup>

On 16 February 2018, Contractual Compliance sent a third compliance notice to the Requestor, and advised that “[f]ailure to respond to this notice by 23 February 2018 will result in a notice of breach being issued.”<sup>36</sup> The Requestor responded on 16 February 2018, and again on 17 February 2018, but Contractual Compliance determined that the communications were insufficient to demonstrate compliance because the Requestor did not provide Contractual Compliance with the requested information and records.<sup>37</sup> Specifically, the Requestor refused to provide evidence of WHOIS validation and verification pursuant to the WAPS requirements, as well as information regarding the Requestor's obligations concerning retention and inspection of RNH and Registration Data.<sup>38</sup>

On 23 February 2018, Contractual Compliance contacted the Requestor via the primary contact phone number and provided the Requestor with details regarding the Complaint. Contractual Compliance also tried unsuccessfully to contact the primary contact mobile number.<sup>39</sup> The Requestor never responded.<sup>40</sup> Consistent with its process, Contractual

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<sup>33</sup> Attachment 1, at Pg. 18; Notice of Termination, at Pg. 4.

<sup>34</sup> Attachment 1, at Pgs. 17-18; Notice of Termination, at Pg. 4.

<sup>35</sup> See Notice of Termination, at Pg. 4.

<sup>36</sup> *Id.*; Attachment 1, at Pgs. 14-17.

<sup>37</sup> Attachment 1, at Pgs. 9-10, 13-14.

<sup>38</sup> *Id.*, at Pgs. 9-14.

<sup>39</sup> *Id.*, at Pg. 9; Notice of Termination, at Pg. 5.

<sup>40</sup> See Notice of Termination, at Pg. 5.

Compliance then conducted a compliance check on 26 February 2018 to identify whether there were other areas for which the Requestor was noncompliant.<sup>41</sup>

**C. Contractual Compliance’s Formal Resolution Process: Breach Notice and Termination Notice.**

Under the Contractual Compliance process and approach, the Formal Resolution Process “begins when contracted parties have either failed to collaborate effectively during the informal resolution process or otherwise continue to be non-compliant after attempts at informal resolution have been unsuccessful.”<sup>42</sup> On 27 February 2018, Contractual Compliance issued the Breach Notice via email, facsimile, and courier to the Requestor.<sup>43</sup> According the Breach Notice, the breach resulted from the following:

(1) “failure to take reasonable steps to investigate and correct claimed Whois inaccuracies regarding the domain name <tomzink.com>, as required by Section 3.7.8 of the RAA”; (2) “failure to validate and verify Whois contact information, as required by Sections 1, 2, and 4 of the Whois Accuracy Program Specification (‘WAPS’) of the RAA”; and (3) “failure to maintain and make available to ICANN organization registration data and records relating to dealings with the Registered Name Holder (‘RNH’) of the domain name <tomzink.com>, as required by Sections 3.4.2 and 3.4.3 of the RAA.”<sup>44</sup>

The Breach Notice also identified three additional areas in which the Requestor had been deemed non-compliant:

(1) “failure to provide domain name data in the specified response format, as required by Section 1.4 of the Registration Data Directory Service (Whois) Specification of the RAA (‘Whois Specification’) and the Advisory: Clarifications to the Registry Agreement, and the 2013 [RAA] regarding applicable Registration Data Directory Service (Whois) Specifications (‘Clarifications’)”;

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<sup>41</sup> *Id.*

<sup>42</sup> See Formal Resolution Process – General Guidelines, available at <https://www.icann.org/en/system/files/files/formal-resolution-07mar17-en.pdf>.

<sup>43</sup> See generally, Notice of Breach.

<sup>44</sup> *Id.*, at Pg. 1.

(2) “failure to include a link in its registration agreement to its renewal fees and post-expiration renewal fees (if different), as required by Section 4.1 of the Expired Registration Recovery Policy (‘ERRP’); and (3) “failure to publish a correspondence address on [the Requestor’s] website, as required by Section 3.17 and Section 7 of the Registrar Information Specification (‘RIS’) of the RAA.”<sup>45</sup>

Attached to the Breach Notice was a more detailed explanation of the Requestor’s breaches and areas of non-compliance, as well as a chronology of the communications between Contractual Compliance and the Requestor.<sup>46</sup>

Contractual Compliance requested that the Requestor cure the breaches by 20 March 2018, 21 days from the date of issuance of the Breach Notice.<sup>47</sup> Contractual Compliance advised that if the Requestor failed to timely cure the breaches and provide the requested information, ICANN organization might terminate the Requestor’s RAA.<sup>48</sup>

In accordance with the Contractual Compliance Formal Resolution Process, the Breach Notice was published on the Notices webpage at <https://www.icann.org/compliance/notices>.<sup>49</sup>

One week before the 20 March 2018 cure deadline, on 13 March 2018, Contractual Compliance sent a reminder email to the Requestor.<sup>50</sup> The Requestor did not respond.<sup>51</sup>

Accordingly, pursuant to Section 5.5.4 of the RAA, on 21 March 2018, Contractual Compliance issued the Termination Notice via email, facsimile, and courier.<sup>52</sup> The Termination Notice reiterated the six breaches/areas of noncompliance referenced in the Breach Notice.<sup>53</sup>

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<sup>45</sup> *Id.*, at Pgs. 1-2.

<sup>46</sup> *Id.*, at Pgs. 4-6.

<sup>47</sup> *Id.*, at Pg. 2.

<sup>48</sup> *Id.*, at Pg. 3.

<sup>49</sup> See Complaints and Disputes FAQ, Question 32, available at <https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#top>.

<sup>50</sup> Notice of Termination, at Pg. 5.

<sup>51</sup> *Id.*

<sup>52</sup> See generally *id.*; see also RAA, § 5.5.4.

<sup>53</sup> Notice of Termination, at Pgs. 1-2.

The termination was scheduled to become effective 20 April 2018, but has since been suspended pending resolution of Request 18-3.<sup>54</sup>

**D. Request 18-3.**

The Requestor submitted Request 18-3 on 30 March 2018 as a request for urgent reconsideration.<sup>55</sup> The Requestor challenges ICANN’s decision to issue the Termination Notice, claiming that this decision “is based on faulty data, misunderstandings and an overall failure of ICANN staff/policies/procedures,”<sup>56</sup> and states that it “would like to see” “the RAA termination cancelled”; “the processes/staff which led to the termination letter reviewed”; and “the libelous claims now published on [ICANN organization’s] website updated with an apology/retraction.”<sup>57</sup>

The BAMC considered whether Request 18-3 should be considered on an urgent basis, as required under the Bylaws,<sup>58</sup> and concluded that Request 18-3 did not meet the requirements for urgent reconsideration.<sup>59</sup> The Bylaws require the Requestor to include a “discussion of why the matter is urgent for reconsideration,”<sup>60</sup> which the BAMC found the Requestor did not do.<sup>61</sup> The BAMC offered the Requestor the opportunity to provide additional information as to why the request was urgent for reconsideration or offered to instead treat Request 18-3 as a standard reconsideration request.<sup>62</sup> On 4 April 2018, the Requestor agreed that Request 18-3 could be

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<sup>54</sup> See <https://www.icann.org/compliance/notices>.

<sup>55</sup> See Request 18-3, § 7, at Pg. 3.

<sup>56</sup> *Id.*, § 5, at Pg. 2.

<sup>57</sup> *Id.*, § 8, Pg. 3.

<sup>58</sup> ICANN Bylaws, Art. 4, § 4.2(s) & 4.2(t).

<sup>59</sup> See Attachment 2, Pg. 2.

<sup>60</sup> Bylaws Art. IV, § 4.2(s).

<sup>61</sup> See Attachment 2, Pg. 2.

<sup>62</sup> *Id.*

processed under the standard Reconsideration process.<sup>63</sup> The termination process has been put on hold pending resolution of Request 18-3.<sup>64</sup>

#### **E. The Ombudsman’s Substantive Evaluation.**

In accordance with the Reconsideration process, ICANN organization transmitted Request 18-3 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. On 5 May 2018, the Ombudsman submitted his substantive evaluation to the BAMC pursuant to Article 4, Section 4.2(l)(ii) of ICANN’s Bylaws.<sup>65</sup> The Ombudsman concluded that “nothing [the] Requestor has set forth in Request for Reconsideration 18-3 merits a recommendation by the BAMC or the Board to take any of the actions as requested by [the] Requestor.”<sup>66</sup>

Accordingly, the BAMC reviews Request 18-3 pursuant to Article 4, Sections 4.2(l)(ii) and 4.2(q).

#### **F. Relief Requested.**

The Requestor asks the BAMC to:

1. Cancel the termination of the RAA;
2. Review “the processes/staff which led to the termination letter;” and
3. Update “the libelous claims now published on [ICANN organization’s] website with an apology/retraction.”<sup>67</sup>

### **III. Issue Presented.**

The issues are as follows:

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<sup>63</sup> *Id.* at Pgs. 3-4.

<sup>64</sup> See <https://www.icann.org/compliance/notices>.

<sup>65</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(ii); *see also* Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3.

<sup>66</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3, at Pg. 8.

<sup>67</sup> Request 18-3, § 8, at Pg. 3.

1. Whether ICANN organization complied with applicable Commitments, Core Values, and established policies when it issued the Termination Notice;
2. Whether ICANN organization relied on faulty data or misunderstandings when it issued the Termination Notice; and
3. Whether ICANN organization published defamatory statements on ICANN organization's website, in violation of the applicable Commitments, Core Values, and established policies.

#### **IV. The Relevant Standards for Reconsideration Requests and The Contractual Compliance Process.**

##### **A. The Relevant Standards for Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information."<sup>68</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>69</sup> Within 15 days of receipt of the Request, the Ombudsman submits to the

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<sup>68</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>69</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).



BAMC his or her substantive evaluation.<sup>70</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>71</sup>

On 3 April 2018, the BAMC determined that Request 18-3 is sufficiently stated and sent Request 18-3 to the Ombudsman for review and consideration. The Ombudsman concluded that nothing the Requestor has set forth in Request 18-3 merits a recommendation by the BAMC or the Board to take any of the actions as requested by the Requestor.<sup>72</sup> The BAMC has considered Request 18-3, the Ombudsman’s substantive evaluation of Request 18-3, and all other relevant materials, and issues this Recommendation.

#### **B. The Contractual Compliance Process.**

Contractual Compliance adheres to a defined approach and process to ensure compliance with contractual obligations.<sup>73</sup> The processes, established in collaboration with the different ICANN stakeholders, ensure consistency for all parties involved, including ICANN organization’s personnel, contracted parties and complainants.”<sup>74</sup>

The Informal Resolution Process “allows [Contractual Compliance] to work closely with registrars and registries to help them understand their contractual obligations and overcome any contractual compliance challenges and issues they may have.” Contractual Compliance “attempts to resolve contractual compliance matters informally before pursuing formal remedies

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<sup>70</sup> ICANN Bylaws, 22 July 2017, Art. 4, 4.2(l)(ii).

<sup>71</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>72</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3, at Pg. 8.

<sup>73</sup> See About Contractual Compliance’s Approach and Processes webpage, available at <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en>.

<sup>74</sup> See Complaints and Disputes FAQ, Question 31, available at <https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#top>. See also Overall Compliance Approach, available at <https://www.icann.org/en/system/files/files/overall-03oct14-en.pdf>.

available under the agreements.”<sup>75</sup> The Informal Resolution Process involves the following steps:

1. Contractual Compliance reviews all complaints it receives, regardless of the source, to ensure that the complaints are within the scope of the relevant ICANN agreement and consensus policies.
2. If needed, Contractual Compliance follows up with the reporter for additional information.
3. Contractual Compliance informs the reporter that it has sent the complaint to the contracted party.
4. Contractual Compliance works with registrars and registries to resolve contractual compliance matters via 1-2-3 inquiry/notice or an escalated notice.
5. Contractual Compliance reviews responses from contracted parties and as needed, consults with other departments in the ICANN organization and Public Technical Identifiers (PTI).
6. If the complaint reaches the third notice, or escalated notice, Contractual Compliance: (a) informs internal groups of potential enforcement escalation; (b) conducts a full compliance check to identify other non-compliance areas; (c) conducts a data escrow audit; and (d) refers the matter to the Enforcement team.
7. Once resolved, Contractual Compliance informs both the reporter and the contracted party via a closure notice.<sup>76</sup>

The Formal Resolution Process commences when contracted parties have either failed to sufficiently collaborate during the Informal Resolution Process or otherwise continue to be noncompliant after attempts at informal resolution have been unsuccessful.<sup>77</sup> Notices sent during the Formal Resolution Process are published on <https://www.icann.org/compliance/notices>, and

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<sup>75</sup> See Complaints and Disputes FAQ, Question 32.

<sup>76</sup> See Informal Resolution Process Infographic, available at <https://www.icann.org/en/system/files/files/informal-resolution-07mar17-en.pdf>.

<sup>77</sup> See Formal Resolution Process Infographic, available at <https://www.icann.org/en/system/files/files/formal-resolution-07mar17-en.pdf>.

Contractual Compliance updates the progress of each enforcement action.<sup>78</sup> The Formal Resolution Process involves the following steps:

1. Contractual Compliance prepares the notice, consults with other departments in the ICANN organization, sends the notice to the contracted party and publishes it on Notices page.
2. Contractual Compliance reviews responses from contracted parties and as needed, consults with other departments in the ICANN organization and PTI.
3. Contractual Compliance may grant an extension based on the remaining efforts to cure the breach, the proposed plan and complexity of the issues.
4. Contractual Compliance may progress to other enforcement actions on a case-by-case basis.
5. Once resolved, Contractual Compliance informs both the reporter and the contracted party via a closure notice.
6. Contractual Compliance updates the Notices page to reflect the status of the enforcement action.<sup>79</sup>

Pursuant to Section 5.5.4 of the 2013 RAA, the RAA may be terminated before its expiration by ICANN organization if the “Registrar fails to cure any breach of this Agreement within twenty-one (21) days after ICANN gives Registrar notice of the breach.”<sup>80</sup>

## **V. Analysis and Rationale.**

### **A. Contractual Compliance Complied with Applicable Policies and Procedures When it Issued the Termination Notice Based on the Requestor’s Failure to Cure the Areas of Non-Compliance Identified in the Breach Notice.**

The Requestor claims that Contractual Compliance’s decision to issue the Termination Notice was based on an “overall failure of ICANN staff/policies/procedures.”<sup>81</sup> As discussed in detail below, Contractual Compliance adhered to the applicable policies and procedures when

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<sup>78</sup> *Id.*

<sup>79</sup> *See id.*

<sup>80</sup> *See* RAA, § 5.5.4.

<sup>81</sup> Request 18-3, § 5, at Pg. 2.

addressing each of the six areas of noncompliance identified in the Termination Notice.

Accordingly, the BAMC concludes that the Requestor's claims are unsupported and do not warrant reconsideration.

1. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to take reasonable steps to investigate and correct WHOIS inaccuracies.*

The Requestor claims that the Complaint regarding the <tomzink.com> domain name contained inaccuracies that "were clearly and obviously faults in the ICANN reporting process;" that the Requestor nonetheless contacted the registrant and updated the inaccuracies; and that Contractual Compliance's "demands for copies of communications to 'demonstrate compliance' are both unreasonable and unnecessary."<sup>82</sup> The Requestor also claims that Contractual Compliance did not manually review the Complaint and instead automatically forwarded it to the Requestor. The Requestor's claims are factually incorrect and do not support reconsideration.

As detailed above, Contractual Compliance follows a defined approach and process to ensure compliance with contractual obligations.<sup>83</sup> Upon receipt of a complaint, the complaint is evaluated to ensure that it is within the scope of the relevant RAA and consensus policy. Once validated, the complaint will be forwarded to the sponsoring registrar, which must take reasonable steps to investigate and correct inaccurate data as part of the Informal Resolution Process.<sup>84</sup> In the course of evaluating Request 18-3, ICANN organization confirmed that Contractual Compliance does not modify complaints, except to redact reporter-related data associated with requests for anonymity, even if it determines that portions of the complaint are

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<sup>82</sup> Request 18-3, § 9, at Pgs. 4-5.

<sup>83</sup> See About ICANN's Contractual Compliance Approach and Processes webpage, available at <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en>.

<sup>84</sup> See About WHOIS Inaccuracies webpage, available at <https://www.icann.org/resources/pages/inaccuracy-2013-03-22-en>.

inaccurate. Registrars are free to explain why portions of a complaint do not need to be addressed, but the fact that a portion of a complaint is inaccurate does not waive the need to address the accurate/in-scope portions of the complaint.

Contractual Compliance requests information and records from the relevant registrar to confirm the registrar has complied with WAPS, including: (1) “copies of correspondence between registrar/reseller and reporter/registrar”; (2) “steps taken to investigate the claimed inaccuracy or suspend [the] domain”; and (3) “evidence of [the] registrar’s validation and verification of WHOIS information.”<sup>85</sup>

Here, Contractual Compliance followed this process with respect to the Complaint at issue in Request 18-3. Upon receipt of the Complaint, Contractual Compliance evaluated and confirmed that the Complaint was within the scope of the relevant RAA and consensus policies. During this process, Contractual Compliance identified that while some portions of the Complaint may have been inaccurate, the Complaint contained other portions that were within scope. Thus, Contractual Compliance initiated the Informal Resolution Process by sending the first compliance notice to the Requestor, attaching the entire Complaint.<sup>86</sup>

On 24 January 2018, the Requestor informed Contractual Compliance that it had contacted the registrant and fixed the inaccuracies.<sup>87</sup> However, although some of the WHOIS information for the domain name <tomzink.com> had been updated since Contractual Compliance forwarded the Requestor the related WHOIS Complaint, other deficiencies remained, including that information in the Administrative and Technical fields (such as street

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<sup>85</sup> See ICANN Community Forum 61, at Slides 21-22, *available at* <https://www.icann.org/en/system/files/files/presentation-compliance-registrar-outreach-13mar18-en.pdf>.

<sup>86</sup> See Notice of Termination, at Pg. 4.

<sup>87</sup> Attachment 1, at Pgs. 27-28.

names) appeared to belong to the Requestor rather than the registrant.<sup>88</sup> Additionally, the Requestor had not validated the postal address under WAPS to ensure it was in a proper format for the applicable country as defined in the UPU Postal addressing format templates.<sup>89</sup>

The Requestor also did not provide Contractual Compliance with evidence of the required registrant verification under WAPS Sections 1, 2 and 4 or validation under WAPS Sections 1 and 2. As part of the verification, Contractual Compliance requested the following, which Requestor did not provide: (1) copies of correspondence between registrar and registrant; (2) evidence that the email verification occurred and that an affirmative response from the RNH was received; and (3) the method and result of the Requestor's validation for format of the updated WHOIS data.<sup>90</sup>

Because the efforts undertaken by the Requestor were insufficient to demonstrate compliance, Contractual Compliance attempted to continue resolving the deficiencies informally through the issuance of second and third compliance notices between 8 February and 26 February 2018 before pursuing formal remedies available under the RAA.<sup>91</sup> The Requestor failed to sufficiently cure the breaches during the Informal Resolution Process, thus leading Contractual Compliance to escalate the matter to the Formal Resolution Process by the issuance of the Breach Notice on 27 February 2018.<sup>92</sup> As noted above, the Requestor never responded to the Breach Notice, despite outreach efforts from Contractual Compliance to the Requestor.<sup>93</sup> As a result, Contractual Compliance was forced to escalate the matter to termination in accordance with its process and Section 5.5.4 of the RAA.

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<sup>88</sup> Contractual Compliance staff confirmed this fact during investigation of Request 18-3.

<sup>89</sup> *See, e.g.*, Attachment 1, at Pg. 25.

<sup>90</sup> *Id.*, at Pgs. 21-22.

<sup>91</sup> Notice of Termination, at Pgs. 4-5.

<sup>92</sup> *Id.*, at Pg. 5.

<sup>93</sup> *Id.*

Accordingly, the BAMC concludes that ICANN organization adhered to applicable policies and procedures when reviewing and processing the Complaint, issuing the Breach Notice, and issuing the Termination Notice when it determined that the breaches had not been cured within 21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA. The Requestor fails to provide any evidence to the contrary.

2. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to validate and verify WHOIS contact information, as required by WAPS.*

The Requestor challenges Contractual Compliance's decision to issue the Termination Notice based on the Requestor's failure to validate and verify WHOIS contact information, as required by WAPS. Specifically, the Requestor claims that Contractual Compliance "misunderstand[s] ... the technologies involved," that "[v]alidation of client submitted data is done prior to acceptance of that data, and [that] manual 'eyeballing' of the data is not a general requirement."<sup>94</sup> The Requestor explained that "[i]n the event of certain specific data being updated (and subject to it not already having been verified on other domains) automated processes are then invoked as needed in accordance with [WAPS] 1.f."<sup>95</sup>

Again, the Requestor's claim is factually incorrect and does not warrant reconsideration. WAPS Section 1 requires the Requestor, upon "any change in the [RNH] with respect to any Registered Name sponsored by" the Requestor, to "[v]alidate the presence of data for all fields required under Subsection 3.3.1 of the Agreement in a proper format," and validate that other contact information is in the proper format.<sup>96</sup> It also requires the Requestor to verify "the email address of the [RNH] ... by sending an email requiring an affirmative response through a tool-

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<sup>94</sup> Request 18-3, § 9, at Pg. 5.

<sup>95</sup> *Id.*

<sup>96</sup> RAA, WAPS § 1.

based authentication method....”<sup>97</sup> Within 15 days of receiving “any changes to contact information in Whois ..., [the Requestor] will validate and, to the extent required by Section 1, verify the changed fields in the manner specified in Section 1 above. If [the Requestor] does not receive an affirmative response from the [RNH] providing the required verification, [the Requestor] shall either verify the applicable contact information manually or suspend the registration....”<sup>98</sup> WAPS Section 4 requires that if the Requestor “has any information suggesting that the contact information ... is incorrect[,] ... [it] must verify or re-verify as applicable....” If the Requestor does not receive an affirmative response, it “shall either verify the applicable contact information manually or suspend the registration.”<sup>99</sup>

As detailed above, Contractual Compliance requested this information from the Requestor throughout the Informal Resolution and Formal Resolution Processes. The Requestor refused to provide the requested information. To date, Contractual Compliance has not received evidence of verification or validation, as required under WAPS Sections 1, 4, and 5.<sup>100</sup>

Accordingly, the BAMC concludes that Contractual Compliance adhered to applicable policies and procedures in issuing the Termination Notice based on the Requestor’s failure to validate and verify WHOIS contact information, as required by WAPS.

3. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor’s failure to maintain and make available to ICANN registration data and records relating to the Requestor’s communications with the RNH of the domain name <tomzink.com>.*

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<sup>97</sup> *Id.* § 1.f.i.

<sup>98</sup> *Id.* § 2.

<sup>99</sup> *Id.* § 4.

<sup>100</sup> See Notice of Termination, at Pg. 5. This was further confirmed with Contractual Compliance staff during investigation of Request 18-3.



The Requestor challenges Contractual Compliance’s decision to issue the Termination Notice based on the Requestor’s failure to maintain and make available to ICANN organization registration data and records relating to the Requestor’s communications with the RNH of the domain name <tomzink.com>. As explained above, Sections 3.4.2 and 3.4.3 of the RAA require the Requestor to maintain records “relating to its dealings with Registry Operator(s) and [RNHs],” including correspondence, and to make those available for inspection and copying to ICANN upon reasonable notice.<sup>101</sup> If the Requestor “believes that the provision of any such data, information or records to ICANN would violate applicable law or any legal proceedings, ICANN and [the Requestor] agree to discuss in good faith whether appropriate limitations, protections or alternative solutions can be identified to allow the production of such data.”<sup>102</sup>

Here, the Requestor claims that EU privacy laws limit the types of data that can be exported to the United States, and contends that it is prohibited from providing ICANN organization the requested data by such privacy laws.<sup>103</sup> Yet, during correspondence with Contractual Compliance, the Requestor never raised EU privacy law as a basis for withholding the requested information.<sup>104</sup> On 10 and 16 February 2018, the Requestor stated “we don’t provide details of private communications to 3<sup>rd</sup> parties,” but did not provide a reason for withholding such communications.<sup>105</sup> These statements do not reference any concerns regarding privacy laws.

Because the Requestor never raised any concerns regarding EU privacy laws, there was no reason, let alone an obligation, for Contractual Compliance to discuss with the Requestor

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<sup>101</sup> RAA §§ 3.4.2, 3.4.3.

<sup>102</sup> *Id.* § 3.4.3.

<sup>103</sup> Request 18-3, § 9, at Pgs. 6-7.

<sup>104</sup> *See generally*, Attachment 1.

<sup>105</sup> *Id.*, at Pgs. 13-14, 18.

appropriate limitations, protections or alternative solutions to allow the production of such data. Rather, Contractual Compliance acted consistently with its obligations when it (i) continued to seek records of the verification and validation that the Requestor performed to address the inaccuracies in the Complaint; and (ii) issued the Breach Notice and Termination Notice when it did not receive that information.

Accordingly, the BAMC concludes that Contractual Compliance adhered to applicable policies and procedures when it issued the Breach Notice and Termination Notice pursuant to Section 5.5.4 of the RAA for Requestor's failure to maintain and make available to ICANN organization registration data and records relating to the Requestor's communications with the RNH of the domain name <tomzink.com>.

4. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to provide domain name data in the specified response format, as required by the RAA.*

The Requestor challenges Contractual Compliance's decision to issue the Termination Notice based on its failure to provide domain name data in the format required by the RAA. Specifically, the Requestor claims that "all necessary changes to meet staff requirements (which go above and beyond the documented specification) were met in advance of the arbitrary deadline," and that Contractual Compliance's statement that the Requestor "continues to be out of compliance" indicates they did not check."<sup>106</sup> The Requestor also claims that Contractual Compliance was "introducing through the 'backdoor' new contractual requirements through 'advisories.'"<sup>107</sup>

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<sup>106</sup> Request 18-3, § 9, at Pg. 8.

<sup>107</sup> *Id.*

However, as indicated above, at the time the Breach Notice was issued, Contractual Compliance conducted a full compliance check to identify whether there were any additional areas of non-compliance, as was its process when the Complaint reached the third compliance notice,<sup>108</sup> and confirmed that there were three additional areas of non-compliance as identified in the Breach Notice.<sup>109</sup> Contractual Compliance did not create additional backdoor requirements, but rather complied with its process when identifying other areas of noncompliance. Contractual Compliance therefore followed its established policies and procedures when it issued the Termination Notice following the Requestor's failure to cure the breaches identified in the Breach Notice.

Accordingly, the BAMC concludes that ICANN organization adhered to applicable policies and procedures when reviewing and processing the Complaint, and issuing the Breach Notice and Termination Notice when it determined that the breaches had not been cured within 21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA.

5. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to include a link in its registration agreement to its renewal fees and post-expiration renewal fees.*

The Requestor challenges Contractual Compliance's decision to issue the Termination Notice based on its failure to include a link in its registration agreement to its renewal fees and post-expiration renewal fees. Section 4.1 of the Expired Registration Recovery Policy (ERRP) provides that the Requestor "must make [its] renewal fees, post-expiration renewal fees (if different), and redemption/restore fees reasonably available to registered name holders and

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<sup>108</sup> See Informal Resolution Process, available at <https://www.icann.org/en/system/files/files/informal-resolution-07mar17-en.pdf>.

<sup>109</sup> Notice of Breach, at Pgs. 1-2.

prospective registered name holders at the time of registration of a gTLD name.”<sup>110</sup> Such fees must “[a]t a minimum ... be clearly displayed on [the Requestor’s] website and a link to these fees must be included in [the Requestor’s] registration agreements”; the fees must also be displayed on the Requestor’s resellers’ websites.<sup>111</sup>

The Requestor claims that it complied with Section 4.1 of the ERRP because its fees are displayed on every page of its website.<sup>112</sup> However, Contractual Compliance was unable to locate a link to the Requestor’s renewal fees on its website and post-expiration renewal fees in the Requestor’s registration agreement.<sup>113</sup>

Accordingly, the BAMC concludes that ICANN organization adhered to applicable policies and procedures when reviewing and processing the Complaint, issuing the Breach Notice, and Termination Notice when it determined that the breaches had not been cured within 21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA.

6. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor’s failure to publish a correspondence address on Requestor’s website.*

The Requestor challenges Contractual Compliance’s decision to issue the Termination Notice based on its failure to publish a correspondence address on its website. The Requestor claims that “[n]o breach has occurred” because the Requestor’s website “has a ‘Contact’ link at the top of every page, has telephone numbers on every page, contains multiple methods of communication (email, telephone, ticket, fax post) listed and clearly shows [its] address at the bottom of every page.”<sup>114</sup> However, the Requestor’s correspondence address on its website must

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<sup>110</sup> ERRP § 4.1, available at <https://www.icann.org/resources/pages/errp-2013-02-28-en>.

<sup>111</sup> *Id.*

<sup>112</sup> Request 18-3, § 9, at Pg. 8.

<sup>113</sup> See Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2. This fact was confirmed by Contractual Compliance staff during investigation of Request 18-3.

<sup>114</sup> Request 18-3, § 9, at Pg. 9.

be the same as the address provided in its RIS.<sup>115</sup> Contractual Compliance was unable to locate the correspondence address provided in the Requestor's RIS on the Requestor's website, and was therefore unable to verify that it matched the RIS.<sup>116</sup> Accordingly, consistent with the RAA and Contractual Compliance's process, Contractual Compliance issued the Termination Notice.

The BAMC concludes that ICANN organization adhered to applicable policies and procedures when reviewing and processing the Complaint, issuing the Breach Notice, and issuing the Termination Notice when it determined that the breaches had not been cured within 21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA.

Ultimately, Contractual Compliance complied with applicable policies and procedures when it concluded that Requestor did not cure any of the six areas of breach of, or noncompliance with, the RAA within 21 days following the issuance of the Breach Notice. Accordingly, reconsideration is not warranted.

**B. The Requestor Has Not Demonstrated That Contractual Compliance Relied on Any False or Inaccurate Information When It Issued the Termination Notice.**

The Requestor claims that Contractual Compliance's decision to issue the Termination Notice "is based on faulty data [and] misunderstandings," and that it is "based on faulty premises such that it is unreasonable and grounds for reconsideration."<sup>117</sup> However, the Requestor has not identified any false or inaccurate information that Contractual Compliance purportedly relied upon when it decided to issue the Termination Notice. The only apparent reference to reliance on false or misleading information is the Requestor's claim that ICANN organization

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<sup>115</sup> RAA, § 3.17; RAA, RIS § 7.

<sup>116</sup> Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2.

<sup>117</sup> Request 18-3, § 5, at Pg. 2; § 7, at Pg. 3.

“misunderstands ... the technologies involved” in the Requestor’s automated validation process of registrant contact information.<sup>118</sup> That is not a basis for reconsideration.

Nor is there evidence that Contractual Compliance relied on any false or misleading information: Contractual Compliance received a Complaint and engaged in a series of communications over the course of two months with the Requestor in an attempt to resolve the breaches informally before escalating the matter to Breach Notice. If Contractual Compliance was in fact relying on faulty data and misunderstandings as the Requestor contends, surely the Requestor could have alerted Contractual Compliance within the 21 days afforded to the Requestor to cure the identified breaches; the Requestor did not make any such clarifications. The BAMC concludes that this allegation, without more, is insufficient to demonstrate that Contractual Compliance relied on any false material information when it decided to issue the Termination Notice.

**C. The Requestor Has Not Demonstrated That ICANN Organization Published Defamatory Statements on Its Website or Violated Its Commitments by Publishing Defamatory Statements on Its Website.**

The Requestor claims that ICANN organization published defamatory statements on its website, which the Requestor asserts “impact [the Requestor’s] reputation of [its] business and the action itself represents a risk to both [the Requestor] and more importantly to [its] registrants.”<sup>119</sup> More specifically, the Requestor claims that certain statements in the Termination Notice are “defamatory and libelous,”<sup>120</sup> the result of “malicious falsehood,”<sup>121</sup> and “published by [ICANN organization] purely for defamation purposes.”<sup>122</sup> The Requestor also

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<sup>118</sup> *Id.*

<sup>119</sup> Request 18-3, § 5, at Pg. 2.

<sup>120</sup> *Id.*, § 9, at Pg. 4.

<sup>121</sup> *Id.*, § 9, at Pg. 9.

<sup>122</sup> *Id.*

claims that ICANN organization published “defamatory provably false claims of contract breach.”<sup>123</sup> However, the Requestor does not provide sufficient information as to why any statements are defamatory, or any other information that would provide a basis for reconsideration.

As discussed above, Notices sent during the Formal Resolution process are published on <https://www.icann.org/compliance/notices>, and ICANN updates the progress of each enforcement action.<sup>124</sup> To the extent that the Requestor is alleging that the publicly available Breach and Termination Notices contain libelous statements, the BAMC again finds such argument unconvincing. ICANN organization takes defamation claims seriously and, as a result, reviewed the Breach and Termination Notices, and confirmed that there is no evidence that the breaches identified or any statements contained in the Notices are false or defamatory. Accordingly, the Requestor has not identified any element of ICANN’s Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN organization, and reconsideration is not warranted on this ground.

## **VI. Recommendation.**

The BAMC has considered the merits of Request 18-3, and, based on the foregoing, concludes that ICANN organization did not violate ICANN’s Mission, Commitments and Core Values or established ICANN policy(ies) or rely on any false or inaccurate relevant information when it issued the Termination Notice following Requestor’s failure to respond to the Breach Notice. Accordingly, the BAMC recommends that the Board deny Request 18-3.

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<sup>123</sup> *Id.*, § 7, at Pg. 3.

<sup>124</sup> See Complaints and Disputes FAQ, Question 32, available at <https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#32>.

ICANN

# FWW-625-17043: Whois Inaccuracy complaint re: tomzink.com

closed

Department: Whois Inaccuracy  
Owner: Contractual Compliance Staff  
Type: Issue  
Status: Closed  
Priority: Normal  
Created: 17 December 2017 02:30 AM Updated: 21 March 2018 07:44 PM  
Whois Inaccuracy

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<b>Whois Inaccuracy Resolved Code</b>	Terminated - Rr	<b>Whois Inaccuracy Complaint Category</b>	Operability - Whois data inaccuracy
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WHOIS

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<b>Registrar Contact</b>	[REDACTED]	<b>Reporter Organization</b>	
<b>Other Domains</b>		<b>Description</b>	
<b>Registrar Name</b>	Astutium Limited	<b>Reporter Telephone Number</b>	
<b>Complaint Type</b>		<b>IANA ID</b>	1471
<b>Registry Name</b>	Verisign	<b>Reporter Name</b>	[REDACTED]
<b>Reporter Email</b>	[REDACTED]	<b>Anonymous Submission</b>	No
<b>Anonymous Reason</b>		<b>Domain Name</b>	tomzink.com
<b>Registrant Name</b>	NA NA	<b>Registrant Address</b>	[REDACTED]
<b>Administrative Contact Name</b>		<b>Administrative Contact Address</b>	
<b>Administrative Contact Phone</b>		<b>Registrar Secondary Contact</b>	[REDACTED]
<b>Registry Secondary Contact</b>		<b>ID of Parent Ticket</b>	
<b>From Bulk Upload</b>		<b>RAA Version</b>	2013
<b>Accreditation Date</b>	2014-10-05	<b>Registrar Abuse Contact</b>	not-found-in-radar
<b>Registrar Abuse Contact Phone</b>	not-found-in-radar	<b>Reseller</b>	
<b>GAC Category 1 Type</b>		<b>Notice/Inquiry</b>	Notice

WHOIS service data

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<b>Report ID</b>	6da08297224fb16017ebf9636b7e88c694593ae4	<b>Problem Mask</b>	68169720922112
<b>Closed Email Sent</b>	1		

GENERIC REGISTRY

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<b>TLD</b>		<b>Country</b>	
<b>Mailing Address</b>		<b>State/Region</b>	
<b>Postcode</b>		<b>City</b>	
<b>Registry Compliance Contact Name</b>		<b>Registry Compliance Email Address</b>	
<b>Registry Primary Contact Name</b>		<b>Registry Primary Contact Email</b>	

Posts

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Contractual Compliance Staff Dea [REDACTED]

(Third Party) Thank you for submitting a Whois Inaccuracy complaint concerning the domain name tomzink.com. ICANN has continued to process



your Whois Inaccuracy complaint concerning the domain name tomzink.com.

On 21 March 2018, ICANN issued a notice of termination to the registrar, Astutium Limited (IANA 1471). Details regarding the notice of termination can be found at <https://www.icann.org/compliance/notices> , and a direct link to the notice is [https://www.icann.org/uploads/compliance\\_notice/attachment/1013/serad-to-golding-21mar18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1013/serad-to-golding-21mar18.pdf) . On or about the effective date of the termination, the registrar's domain names will be transferred to a different registrar. If after that time, you believe Whois Inaccuracies still exist for the domain name, please file a new complaint with ICANN.

ICANN considers this matter now closed.

Please do not reply to the email. If you require future assistance, please email [compliance@icann.org](mailto:compliance@icann.org); if you have a new complaint, please submit it at <http://www.icann.org/resources/compliance/complaints> .

ICANN is requesting your feedback on this closed complaint. Please complete this optional survey at <https://www.surveymonkey.com/s/8F2Z6DP?ticket=FVW-625-17043> .

Sincerely,

ICANN Contractual Compliance

#####

> Dear [REDACTED],  
>  
> ICANN has continued to process your Whois Inaccuracy complaint concerning the domain name tomzink.com.  
>  
> On 27 February 2018, ICANN issued a notice of breach to the registrar, Astutium Limited (IANA 1471). Details regarding the notice of breach can be found at <https://www.icann.org/compliance/notices> , and a direct link to the notice is [https://www.icann.org/uploads/compliance\\_notice/attachment/1003/serad-to-golding-27feb18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1003/serad-to-golding-27feb18.pdf) .  
>  
> To learn more about the ICANN's Contractual Compliance Approach and Processes, please see <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en> . ICANN will provide an update when available.  
>  
> Sincerely,  
>  
> ICANN Contractual Compliance  
>  
> #####  
>  
>> Dear [REDACTED]  
>>  
>> Thank you for submitting a Whois inaccuracy complaint concerning the domain name tomzink.com. Your report has been entered into ICANN's database. For reference your ticket ID is: FVW-625-17043.  
>>  
>> ICANN will follow up with the registrar per process and provide you an update with its findings.  
>>  
>> For more information about ICANN's process and approach, please visit <http://www.icann.org/en/resources/compliance/approach-processes> .  
>>  
>> Sincerely,  
>>  
>> ICANN Contractual Compliance  
>>  
>> #####  
>>  
>> The problem summary:  
>>  
>> Reporter Name: [REDACTED]  
>> Reporter Email: [REDACTED]  
>> Domain being reported: tomzink.com  
>>  
>> Time of submission/processing: Sun Dec 17 02:11:44 2017  
>>  
>> Problem in whois block: Expiration Date  
>> --- Error in date: Nothing to report  
>>  
>> Problem in whois block: Technical Contact  
>> --- Error in address: Nothing to report  
>> --- Error in phone number: Phone is missing  
>> --- Error in name: No such person or entity  
>> --- Error in email: Nothing to report  
>> --- Error in fax number: Fax is missing

>> --- Comment: A made-up name is entered. No phone or fax numbers.  
>>  
>> Problem in whois block: Registrant Contact  
>> --- Error in address: Nothing to report  
>> --- Error in name: No such person or entity  
>> --- Comment: A made-up name is entered.  
>>  
>> Problem in whois block: Registration Date  
>> --- Error in date: Nothing to report  
>>  
>> Problem in whois block: Administrative Contact  
>> --- Error in address: Nothing to report  
>> --- Error in phone number: Phone is missing  
>> --- Error in name: No such person or entity  
>> --- Error in email: Nothing to report  
>> --- Error in fax number: Fax is missing  
>> --- Comment: A made-up name is entered. No phone or fax numbers.  
>>  
>> The whois at the time of processing is:  
>>  
>> REGISTRAR WHOIS:  
>>  
>> Astutium Registration Platform WHOIS Server 1.1.9  
>>  
>> Register your domains today at <http://www.astutium.com>  
>>  
>> Domain Name: tomzink.com  
>> Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
>> Registrar WHOIS Server: whois.astutium-grs.com  
>> Registrar URL: <http://www.astutium-grs.com>  
>> Updated Date: 2017-08-02T7:08:06+0100  
>> Created Date: 2001-01-17T18:01:52+0000  
>> Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
>> Registrar: Astutium Limited  
>> Registrar IANA ID: 1471  
>> Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
>> Registrar Abuse Contact Phone: Not Available.  
>> Reseller: Registration Services Provided By Astutium Ltd  
>> Domain Status: REGISTERED  
>> Domain Status: REGISTRANT\_TRANSFER LOCK  
>> Registry Registrant ID:  
>> Registrant Name: NA NA

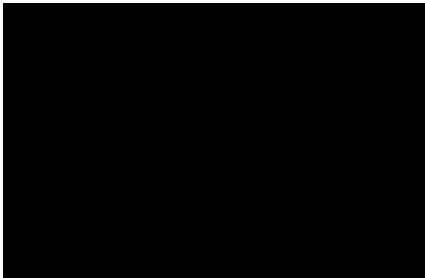


>> Registry Admin ID:  
>> Admin Name: Domain Admin  
>> Admin Organisation: Astutium Limited



>> Registry Tech ID:  
>> Tech Name: Domain Admin  
>> Tech Organisation: Astutium Limited





>> Name Server: ns1.this-dns.net  
 >> Name Server: ns2.this-dns.net  
 >> DNSSEC: unsigned  
 >> URL of the ICANN WHOIS Data Problem Reporting System:  
 >> <http://wdprs.internic.net/>  
 >> Last update of WHOIS database: 2017-12-17T2:12:8+0000  
 >>  
 >> An explanation of the domain statuses can be found at  
 >> <http://www.astutium.com/whois/explain>  
 >>  
 >> Now Available - VPS and Cloud Servers from <http://www.astutium.com>  
 >>  
 >> REGISTRY WHOIS:  
 >>  
 >> Domain Name: TOMZINK.COM  
 >> Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
 >> Registrar WHOIS Server: whois.astutium.com  
 >> Registrar URL: <http://www.astutium.com/>  
 >> Updated Date: 2017-08-02T06 30:05Z  
 >> Creation Date: 2001-01-17T18:57:52Z  
 >> Registry Expiry Date: 2018-01-17T18:57:53Z  
 >> Registrar: Astutium Limited  
 >> Registrar IANA ID: 1471  
 >> Registrar Abuse Contact Email:  
 >> Registrar Abuse Contact Phone:  
 >> Domain Status: clientTransferProhibited  
 >> <https://icann.org/epp#clientTransferProhibited>  
 >> Name Server: NS1.THIS-DNS.NET  
 >> Name Server: NS2.THIS-DNS.NET  
 >> DNSSEC: unsigned  
 >> URL of the ICANN Whois Inaccuracy Complaint Form:  
 >> <https://www.icann.org/wicf/>  
 >>  
 >> For more information on Whois status codes, please visit  
 >> <https://icann.org/epp>  
 >>  
 >> Registrar: Astutium Limited  
 >> Whois Server: whois.astutium.com  
 >>  
 >> #####  
 >>  
 >  
 >

Posted on: 21 March 2018 07:44 PM

Fax

(Staff)

Fax Result: **Fax sent OK**

Contractual Compliance FAX SUCCESSFUL; on 21 March 2018 at approximately 12:15p PT, I faxed notice of termination to primary contact fax number at [REDACTED]

See fax (PPP-924-68796) and receipt (TPZ-260-27141) in inbox:

Dear ICANN,

Your fax was successfully sent to [REDACTED] by eFax.

Date: 2018-03-21 19:26:59 (GMT)  
Number of Pages: 7  
Length of Transmission: 244 seconds  
Receiving Machine Fax ID: OthelloFax:Support

Posted on: 21 March 2018 07:33 PM

**Contractual Compliance Staff**

Dear Rob Golding,

(Third Party)

Attached you will find a notice of termination from ICANN regarding your registrar Astutium Limited (IANA 1471).

Please contact Jennifer Scott (jennifer.scott@icann.org) if you have any questions regarding this notice.

Sincerely,

**Contractual Compliance Staff**

ICANN Contractual Compliance

Posted on: 21 March 2018 07:17 PM

**Contractual Compliance Staff**

Dear Rob Golding,

(Third Party)

This is a reminder that the cure date for the outstanding notice of breach is 19 March 2018. If you wish to cure the breach, please respond by that date addressing all of the items requested in the notice. Please note that failure to sufficiently address all breach items may result in escalation to suspension or termination.

Sincerely,

**Contractual Compliance Staff**

ICANN Contractual Compliance

#####

Posted on: 27 February 2018 09:41 PM UTC

From: [compliance-tickets@icann.org](mailto:compliance-tickets@icann.org)

To: [REDACTED]

CC To: [registrarliaisons@icann.org](mailto:registrarliaisons@icann.org)

> Dear Rob Golding,

>

> Attached you will find a notice of breach from ICANN regarding your registrar Astutium Limited (IANA 1471).

>

> Additionally, please find the Registrar Information Specification (RIS) form at <https://www.icann.org/resources/files/1188911-2015-04-24-en> should Astutium need to make updates to its current RIS form (which is also attached), to cure the breach.

>

> Please take immediate action and cure the breaches mentioned in the attached notice if you want to maintain your registrar's accreditation with ICANN. If you decide to cure the breach, please inform ICANN immediately at [jennifer.scott@icann.org](mailto:jennifer.scott@icann.org) when the breaches are cured.

>

> Please contact Jennifer Scott (jennifer.scott@icann.org) if you have any questions regarding this notice.

>

> Sincerely,

>

**Contractual Compliance Staff**

> ICANN Contractual Compliance

>

>

Posted on: 13 March 2018 01:53 PM

**Contractual Compliance Staff**

[REDACTED]

(Third Party)

ICANN has continued to process your Whois Inaccuracy complaint concerning the domain name tomzink.com.

On 27 February 2018, ICANN issued a notice of breach to the registrar, Astutium Limited (IANA 1471). Details regarding the notice of breach can be found at <https://www.icann.org/compliance/notices> , and a direct link to the notice is [https://www.icann.org/uploads/compliance\\_notice/attachment/1003/serad-to-golding-27feb18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1003/serad-to-golding-27feb18.pdf) .

To learn more about the ICANN's Contractual Compliance Approach and Processes, please see <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en> . ICANN will provide an update when available.

Sincerely,

ICANN Contractual Compliance

#####

> Dear [REDACTED]  
>  
> Thank you for submitting a Whois inaccuracy complaint concerning the domain name tomzink.com. Your report has been entered into ICANN's database. For reference your ticket ID is: FW-625-17043.  
>  
> ICANN will follow up with the registrar per process and provide you an update with its findings.  
>  
> For more information about ICANN's process and approach, please visit <http://www.icann.org/en/resources/compliance/approach-processes> .

> Sincerely,

> ICANN Contractual Compliance

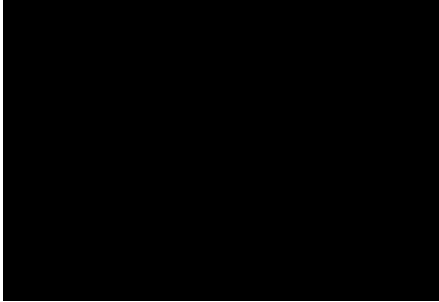
> #####

> The problem summary:

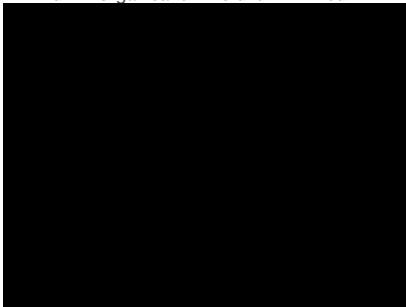
[REDACTED]

> Domain being reported: tomzink.com  
>  
> Time of submission/processing: Sun Dec 17 02:11:44 2017  
>  
> Problem in whois block: Expiration Date  
> --- Error in date: Nothing to report  
>  
> Problem in whois block: Technical Contact  
> --- Error in address: Nothing to report  
> --- Error in phone number: Phone is missing  
> --- Error in name: No such person or entity  
> --- Error in email: Nothing to report  
> --- Error in fax number: Fax is missing  
> --- Comment: A made-up name is entered. No phone or fax numbers.  
>  
> Problem in whois block: Registrant Contact  
> --- Error in address: Nothing to report  
> --- Error in name: No such person or entity  
> --- Comment: A made-up name is entered.  
>  
> Problem in whois block: Registration Date  
> --- Error in date: Nothing to report  
>  
> Problem in whois block: Administrative Contact  
> --- Error in address: Nothing to report  
> --- Error in phone number: Phone is missing  
> --- Error in name: No such person or entity  
> --- Error in email: Nothing to report  
> --- Error in fax number: Fax is missing  
> --- Comment: A made-up name is entered. No phone or fax numbers.  
>  
> The whois at the time of processing is:  
>  
> REGISTRAR WHOIS:  
>  
> Astutium Registration Platform WHOIS Server 1.1.9  
>  
> Register your domains today at <http://www.astutium.com>

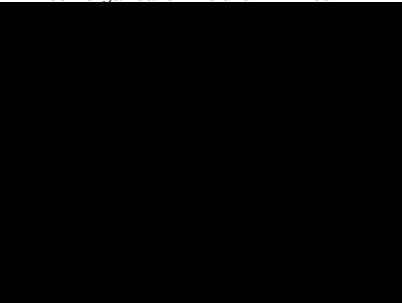
>  
> Domain Name: tomzink.com  
> Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
> Registrar WHOIS Server: whois.astutium-grs.com  
> Registrar URL: <http://www.astutium-grs.com>  
> Updated Date: 2017-08-02T7:08:06+0100  
> Created Date: 2001-01-17T18:01:52+0000  
> Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
> Registrar: Astutium Limited  
> Registrar IANA ID: 1471  
> Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
> Registrar Abuse Contact Phone: Not Available.  
> Reseller: Registration Services Provided By Astutium Ltd  
> Domain Status: REGISTERED  
> Domain Status: REGISTRANT\_TRANSFER\_LOCK  
> Registry Registrant ID:  
> Registrant Name: NA NA  
> Registrant Organisation: Astutium Limited



> Admin Name: Domain Admin  
> Admin Organisation: Astutium Limited



> Registry Tech ID:  
> Tech Name: Domain Admin  
> Tech Organisation: Astutium Limited



> Name Server: ns1.this-dns.net  
> Name Server: ns2.this-dns.net  
> DNSSEC: unsigned  
> URL of the ICANN WHOIS Data Problem Reporting System:  
> <http://wdprs.internic.net/>  
> Last update of WHOIS database: 2017-12-17T2:12:8+0000  
>  
> An explanation of the domain statuses can be found at  
> <http://www.astutium.com/whois/explain>  
>  
> Now Available - VPS and Cloud Servers from <http://www.astutium.com>  
>  
> REGISTRY WHOIS:  
>  
> Domain Name: TOMZINK.COM

> Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
> Registrar WHOIS Server: whois.astutium.com  
> Registrar URL: <http://www.astutium.com/>  
> Updated Date: 2017-08-02T06 30:05Z  
> Creation Date: 2001-01-17T18:57:52Z  
> Registry Expiry Date: 2018-01-17T18:57:53Z  
> Registrar: Astutium Limited  
> Registrar IANA ID: 1471  
> Registrar Abuse Contact Email:  
> Registrar Abuse Contact Phone:  
> Domain Status: clientTransferProhibited  
> <https://icann.org/epp#clientTransferProhibited>  
> Name Server: NS1.THIS-DNS.NET  
> Name Server: NS2.THIS-DNS.NET  
> DNSSEC: unsigned  
> URL of the ICANN Whois Inaccuracy Complaint Form:  
> <https://www.icann.org/wicf/>  
>  
> For more information on Whois status codes, please visit  
> <https://icann.org/epp>  
>  
> Registrar: Astutium Limited  
> Whois Server: whois.astutium.com  
>  
> #####  
>

Posted on: 28 February 2018 05:35 PM



Fax

(Staff)

Fax Result: **Fax sent OK**

J. Scott: FAX SUCCESSFUL; Fax with notice of breach sent on 27 Feb 2018 at approximately 1:45pm PST / 9:45 pm UTC to primary contact fax number [REDACTED]

See fax (LPD-268-19817) and receipt (FJG-841-33434) in inbox:

Your fax was successfully sent to [REDACTED] by eFax.

Date: 2018-02-27 21:51:13 (GMT)

Number of Pages: 8

Length of Transmission: 318 seconds

Receiving Machine Fax ID: OthelloFax:Support

Posted on: 27 February 2018 09:58 PM

Contractual  
Compliance Staff

(Third Party)

Dear Rob Golding,

Attached you will find a notice of breach from ICANN regarding your registrar Astutium Limited (IANA 1471).

Additionally, please find the Registrar Information Specification (RIS) form at <https://www.icann.org/resources/files/1188911-2015-04-24-en> should Astutium need to make updates to its current RIS form (which is also attached), to cure the breach.

Please take immediate action and cure the breaches mentioned in the attached notice if you want to maintain your registrar's accreditation with ICANN. If you decide to cure the breach, please inform ICANN immediately at [jennifer.scott@icann.org](mailto:jennifer.scott@icann.org) when the breaches are cured.

Please contact **Contractual Compliance Staff** if you have any questions regarding this notice.

Sincerely,

Contractual Compliance Staff

ICANN Contractual Compliance

Posted on: 27 February 2018 09:41 PM

All,

(Third Party) Attached please find referral to enforcement, fees statement and compliance check responses.

Posted on: 26 February 2018 07:35 PM

Phone Call

(Staff)

Call Result: **Left message**

Contractual Compliance

Staff: Sta

Contact: Rob Golding

Date: 21 February 2018

Time: 14:50PM TRT, Registrar Local Time 11:50 AM GMT

Phone: [REDACTED]

Called PC, however was not able to talk with Rob. Then, I had a chance to speak with Chris from Technical team, and he said Rob is not in the office. I reminded both pending tickets which requires registrar to take action and respond (i.e. Whois Format/Inaccuracy). Then, left my direct number in case Rob may want to talk.

I also called Rob's mobile number, however it says "This number is not recognizable".

Posted on: 23 February 2018 03:22 PM

**Rob Golding**

(Recipient)

> Thank you for your response. Per your registrar's responses of 10  
> February 2018 and 16 February 2018 it appears that your registrar is  
> unwilling to provide the required records and information requested by  
> ICANN in the prior notice below  
> Please indicate how your registrar  
> proposes to comply with the Whois Accuracy Program Specification  
> (WAPS) for this and future Whois Inaccuracy complaints.

There is no requirement in WAPS to provide you with anything at all.

If you need a reminder of what the WAPS says it is on your website at  
<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#whois-accuracy>

Please explain where on that page it gives any grounds or requirement to  
continue this conversation.

> If your registrar wishes to schedule a call with ICANN concerning this  
> issue, please confirm via reply email.

If compliance need me to come and educate you on how to perform and read  
the response of a whois lookup, let me know and I'll send over our  
consultancy price list.

Beyond me yet again directing you to read the previous responses and for  
you to implement the necessary steps to correct your failures in not  
examining/vetting whois reports as per numerous conversations between  
compliance and the rrs, and as agreed by your management, I cannot see  
the point of a call, unless you somehow need me to say "no, we dont  
provide details of private communications to 3rd parties" rather than  
typing it.

> Failure to respond to this notice and demonstrate compliance with the  
> below requirements by 23 February 2018 will result in a notice of  
> breach being issued against your registrar.

Breach of what ? Not providing something there is no contractual  
requirement to provide and isn't necessary !?!

I'm more than happy to have this escalated to the Ombudsman and/or the  
Board, actually I think I'll have to insist on that now you're making  
threats.



Rob  
--  
Rob Golding

\* domains \* hosting \* vps \* servers \* cloud \* backups \*

Posted on: 17 February 2018 12:46 AM

Contractual  
Compliance Staff

Dear Astutium Limited (1471),

(Third Party)

Thank you for your response. Per your registrar's responses of 10 February 2018 and 16 February 2018 it appears that your registrar is unwilling to provide the required records and information requested by ICANN in the prior notice below. Please indicate how your registrar proposes to comply with the Whois Accuracy Program Specification (WAPS) for this and future Whois Inaccuracy complaints.

If your registrar wishes to schedule a call with ICANN concerning this issue, please confirm via reply email.

Failure to respond to this notice and demonstrate compliance with the below requirements by 23 February 2018 will result in a notice of breach being issued against your registrar.

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

Thank you in advance for your cooperation.

Sincerely,

Contact information Redacted

ICANN Contractual Compliance

#####

Copy of the reply delivered to you 10/Feb/2018

> 1. The Whois inquiries your registrar sent to the RNH regarding the  
> alleged

No, we don't provide details of private communications to 3rd parties

> 2. The emails your registrar sent to the RNH and Account Holder (AH)  
> to

No

> 3. Indicate the option below that describes the actions taken by your  
> registrar to address the alleged Whois inaccuracies:  
> a. Your registrar confirmed that the reported inaccuracy was corrected.

Yes

> 4. If any of the Whois data was updated during the course of your  
> registrar's investigation or if the RNH has changed, provide the  
> methods and results of your registrar's validation of format of the Whois data.

No registrar validation is done or required - we don't allow clients to submit unstructured data

Rob

---  
This email has been checked for viruses by Avast antivirus software.  
<https://www.avast.com/antivirus>

#####

TRANSMITTED VIA ELECTRONIC MAIL AND FACSIMILE

Dear Astutium Limited (1471),

On 20 December 2017 and 8 February 2018, ICANN sent Astutum Limited compliance notices concerning the Whois Inaccuracy complaint below regarding the domain name tomzink.com. In addition, ICANN sent follow-up communications on 19 January 2018, 29 January 2018, and 31 January 2018.

To date, your registrar's replies were insufficient. Although your registrar confirmed the Whois information has been updated, your registrar has not provided ICANN with the records and information requested, including evidence of Whois validation and verification pursuant to the Whois Accuracy Program Specification (WAPS) under the 2013 Registrar Accreditation Agreement (RAA).

Please note, Section 4 of the WAPS states that if your registrar has any information suggesting that the Whois data is inaccurate, your registrar must verify or re-verify the email address(es) as described in Section 1.f.

Further, if the Whois data is updated following a Whois Inaccuracy investigation, WAPS requires registrars to validate that the formats of the updated data comply with the formats specified in Sections 1(a-d) of the WAPS.

In addition, upon request for copies of the inquiries sent to the RNH regarding this matter, your registrar replied "we don't provide details of private communications to 3rd parties." Please refer to Section 3.4 (specifically 3.4.2 and 3.4.3) of the RAA for information regarding your registrar's obligations concerning retention and inspection of Registered Name Holder and Registration Data.

On 15 February 2018, ICANN attempted to reach your registrar's Primary Contact to discuss the foregoing matters. ICANN left a voice message in the general mailbox, but was unable to reach the Primary Contact or Mobile numbers listed in RADAR. If your registrar wishes to schedule a call with ICANN, please confirm via reply email.

To demonstrate compliance, please provide ICANN the following records and information by 23 February 2018:

1. The Whois inquiries your registrar sent to the Registered Name Holder (RNH) regarding the alleged Whois inaccuracies in the complaint below and any responses from the RNH, including the dates, times, means of inquiries, telephone numbers, email addresses and/or postal addresses used.
2. The emails your registrar sent to the RNH and Account Holder (AH) to verify their email addresses and the affirmative responses from the RNH and AH, including the dates, times, means of responses, telephone numbers, email addresses and/or postal addresses used for the responses.
3. As the Whois data was updated during the course of your registrar's investigation, provide the methods and results of your registrar's validation of format of the Whois data. Examples of standard formats include RFC 5322 for email addresses, ITU-T E.164 notation for the format of international telephone numbers and for the format of postal addresses the UPU Postal addressing format templates, the S42 address templates (as they may be updated) or other standard formats for the applicable territory. For more details please refer to the Whois Accuracy Program Specification at <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#whois-accuracy>.

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

Failure to respond to this notice by 23 February 2018 will result in a notice of breach being issued against your registrar.

Sincerely,

Contact nformation Redacted

ICANN Contractual Compliance

#####

The problem summary:



Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date  
--- Error in date: Nothing to report

Problem in whois block: Technical Contact  
--- Error in address: Nothing to report  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact

--- Error in address: Nothing to report  
--- Error in name: No such person or entity  
--- Comment: A made-up name is entered.

Problem in whois block: Registration Date  
--- Error in date: Nothing to report

Problem in whois block: Administrative Contact  
--- Error in address: Nothing to report  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

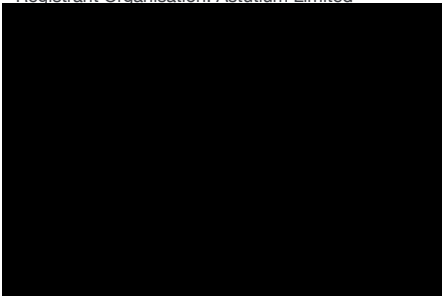
The whois at the time of processing is:

REGISTRAR WHOIS:

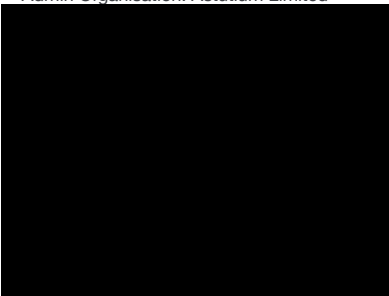
Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

Domain Name: tomzink.com  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium-grs.com  
Registrar URL: <http://www.astutium-grs.com>  
Updated Date: 2017-08-02T7:08:06+0100  
Created Date: 2001-01-17T18:01:52+0000  
Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
Registrar Abuse Contact Phone: Not Available.  
Reseller: Registration Services Provided By Astutium Ltd  
Domain Status: REGISTERED  
Domain Status: REGISTRANT\_TRANSFER LOCK  
Registry Registrant ID:  
Registrant Name: NA NA  
Registrant Organisation: Astutium Limited



Registry Admin ID:  
Admin Name: Domain Admin  
Admin Organisation: Astutium Limited



Registry Tech ID:  
Tech Name: Domain Admin  
Tech Organisation: Astutium Limited

Tech Street: First Floor



Name Server: ns1.this-dns.net  
Name Server: ns2.this-dns.net  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>  
Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:

Domain Name: TOMZINK.COM  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium.com  
Registrar URL: <http://www.astutium.com/>  
Updated Date: 2017-08-02T06 30:05Z  
Creation Date: 2001-01-17T18:57:52Z  
Registry Expiry Date: 2018-01-17T18:57:53Z  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email:  
Registrar Abuse Contact Phone:  
Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
Name Server: NS1.THIS-DNS.NET  
Name Server: NS2.THIS-DNS.NET  
DNSSEC: unsigned  
URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
Whois Server: whois.astutium.com

#####

Posted on: 16 February 2018 11:09 PM

**Rob Golding**

Copy of the reply delivered to you 10/Feb/2018

(Recipient)

> 1. The Whois inquiries your registrar sent to the RNH regarding the  
> alleged

No, we don't provide details of private communications to 3rd parties

> 2. The emails your registrar sent to the RNH and Account Holder (AH)  
> to

No

> 3. Indicate the option below that describes the actions taken by your  
> registrar to address the alleged Whois inaccuracies:  
> a. Your registrar confirmed that the reported inaccuracy was corrected.

Yes

> 4. If any of the Whois data was updated during the course of your  
> registrar's investigation or if the RNH has changed, provide the  
> methods and results of your registrar's validation of format of the Whois data.

No registrar validation is done or required - we don't allow clients to submit unstructured data

Rob

---

This email has been checked for viruses by Avast antivirus software.  
<https://www.avast.com/antivirus>

Posted on: 16 February 2018 04:40 PM

Fax

Fax Result: **Fax sent OK**

Dear ICANN,

Your fax was successfully sent to [REDACTED] by eFax.

Date: 2018-02-16 16:13:42 (GMT)  
Number of Pages: 8  
Length of Transmission: 220 seconds  
Receiving Machine Fax ID: OthelloFax:Support

If you have any questions, please visit our online help center (<https://www.efax.com/efax-help-center>) or contact Customer Support (<https://www.efax.com/contact>).

Thank you for choosing eFax.

Sincerely,  
The eFax Team

Special Offer : Too busy to handle all your business calls? Let eVoice answer, manage and route your phone calls, 24/7. Try it free for one month! (<https://www.evoice.com/business-phone-number>)

-----  
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eFax is a registered trademark of j2 Global, Inc. and affiliates.  
6922 Hollywood Blvd., Los Angeles, CA 90028

This account is subject to the terms listed in the eFax Customer Agreement:  
<http://www.efax.com/legal#agreement>

Posted on: 16 February 2018 04:17 PM

Contractual Compliance Staff

TRANSMITTED VIA ELECTRONIC MAIL AND FACSIMILE

Dear Astutium Limited (1471),

(Third Party)

On 20 December 2017 and 8 February 2018, ICANN sent Astutium Limited compliance notices concerning the Whois Inaccuracy

complaint below regarding the domain name tomzink.com. In addition, ICANN sent follow-up communications on 19 January 2018, 29 January 2018, and 31 January 2018.

To date, your registrar's replies were insufficient. Although your registrar confirmed the Whois information has been updated, your registrar has not provided ICANN with the records and information requested, including evidence of Whois validation and verification pursuant to the Whois Accuracy Program Specification (WAPS) under the 2013 Registrar Accreditation Agreement (RAA).

Please note, Section 4 of the WAPS states that if your registrar has any information suggesting that the Whois data is inaccurate, your registrar must verify or re-verify the email address(es) as described in Section 1.f.

Further, if the Whois data is updated following a Whois Inaccuracy investigation, WAPS requires registrars to validate that the formats of the updated data comply with the formats specified in Sections 1(a-d) of the WAPS.

In addition, upon request for copies of the inquiries sent to the RNH regarding this matter, your registrar replied "we don't provide details of private communications to 3rd parties." Please refer to Section 3.4 (specifically 3.4.2 and 3.4.3) of the RAA for information regarding your registrar's obligations concerning retention and inspection of Registered Name Holder and Registration Data.

On 15 February 2018, ICANN attempted to reach your registrar's Primary Contact to discuss the foregoing matters. ICANN left a voice message in the general mailbox, but was unable to reach the Primary Contact or Mobile numbers listed in RADAR. If your registrar wishes to schedule a call with ICANN, please confirm via reply email.

To demonstrate compliance, please provide ICANN the following records and information by 23 February 2018:

1. The Whois inquiries your registrar sent to the Registered Name Holder (RNH) regarding the alleged Whois inaccuracies in the complaint below and any responses from the RNH, including the dates, times, means of inquiries, telephone numbers, email addresses and/or postal addresses used.
2. The emails your registrar sent to the RNH and Account Holder (AH) to verify their email addresses and the affirmative responses from the RNH and AH, including the dates, times, means of responses, telephone numbers, email addresses and/or postal addresses used for the responses.
3. As the Whois data was updated during the course of your registrar's investigation, provide the methods and results of your registrar's validation of format of the Whois data. Examples of standard formats include RFC 5322 for email addresses, ITU-T E.164 notation for the format of international telephone numbers and for the format of postal addresses the UPU Postal addressing format templates, the S42 address templates (as they may be updated) or other standard formats for the applicable territory. For more details please refer to the Whois Accuracy Program Specification at <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#whois-accuracy>.

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

Failure to respond to this notice by 23 February 2018 will result in a notice of breach being issued against your registrar.

Sincerely,

Contact information Redacted

ICANN Contractual Compliance

#####

The problem summary:



Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date

--- Error in date: Nothing to report

Problem in whois block: Technical Contact

--- Error in address: Nothing to report

--- Error in phone number: Phone is missing

--- Error in name: No such person or entity

--- Error in email: Nothing to report

--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact

--- Error in address: Nothing to report

--- Error in name: No such person or entity

--- Comment: A made-up name is entered.

Problem in whois block: Registration Date

--- Error in date: Nothing to report

Problem in whois block: Administrative Contact

--- Error in address: Nothing to report

--- Error in phone number: Phone is missing

--- Error in name: No such person or entity

--- Error in email: Nothing to report

--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

The whois at the time of processing is:

REGISTRAR WHOIS:

Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

Domain Name: tomzink.com

Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN

Registrar WHOIS Server: whois.astutium-grs.com

Registrar URL: <http://www.astutium-grs.com>

Updated Date: 2017-08-02T7:08:06+0100

Created Date: 2001-01-17T18:01:52+0000

Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000

Registrar: Astutium Limited

Registrar IANA ID: 1471

Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)

Registrar Abuse Contact Phone: Not Available.

Reseller: Registration Services Provided By Astutium Ltd

Domain Status: REGISTERED

Domain Status: REGISTRANT\_TRANSFER\_LOCK

Registry Registrant ID:

Registrant Name: NA NA

Registrant Organisation: Astutium Limited

Registry Admin ID:

Admin Name: Domain Admin

Admin Organisation: Astutium Limited

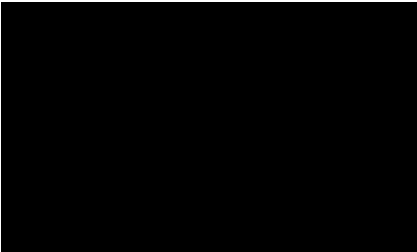
Registry Tech ID:

Tech Name: Domain Admin

Tech Organisation: Astutium Limited

Tech Street: First Floor

Tech Street: Number One Poultry



Name Server: ns1.this-dns.net  
 Name Server: ns2.this-dns.net  
 DNSSEC: unsigned  
 URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>  
 Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:

Domain Name: TOMZINK.COM  
 Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
 Registrar WHOIS Server: whois.astutium.com  
 Registrar URL: <http://www.astutium.com/>  
 Updated Date: 2017-08-02T06 30:05Z  
 Creation Date: 2001-01-17T18:57:52Z  
 Registry Expiry Date: 2018-01-17T18:57:53Z  
 Registrar: Astutium Limited  
 Registrar IANA ID: 1471  
 Registrar Abuse Contact Email:  
 Registrar Abuse Contact Phone:  
 Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
 Name Server: NS1.THIS-DNS.NET  
 Name Server: NS2.THIS-DNS.NET  
 DNSSEC: unsigned  
 URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
 Whois Server: whois.astutium.com

#####

Posted on: 16 February 2018 03:54 PM

Phone Call

Call Result: **Left message**

Staff: **Contractual Compliance Staff**

Contact: Rob Golding

Date: 15 February 2018

Time: 12:30PM TRT, Registrar Local Time 09 30 AM GMT



(Staff)



Called PC, however was not able to talk with Rob. The landline provides options to talk with other departments (e.g. Technical Team, Accounting etc.) tried all, however no one answered the call. Then, pressed "0" to leave a message, and provide the ticket details and emphasize the remaining ICANN's request regarding V/V, then shared my direct number in case he may want to discuss this further with me.

Then, called Rob's mobile number, however it says "This number is not recognizable".

Posted on: 15 February 2018 09:32 AM

[REDACTED]..To date, your registrar has not responded to ICANN and the Whois  
> Inaccuracy issue remains unresolved.

(Recipient)

You were responded to - I told you the case was closed.

> To demonstrate compliance,

There is no requirement to "demonstrate compliance" - it's not a thing like a poster or an event like a farce that would need to be paraded about

You are capable (I would hope) of looking at a whois and thus confirming the state of "compliance"  
[ despite the clear oxymoron that something could not possibly be "non compliant" with something you have admitted you didn't actually check before sending ]

> 1. The Whois inquiries your registrar sent to the RNH regarding the alleged

No, we don't provide details of private communications to 3rd parties

> 2. The emails your registrar sent to the RNH and Account Holder (AH) to

No

> 3. Indicate the option below that describes the actions taken by your

> registrar to address the alleged Whois inaccuracies:

> a. Your registrar confirmed that the reported inaccuracy was corrected.

Yes

> 4. If any of the Whois data was updated during the course of your registrar's

> investigation or if the RNH has changed, provide the methods and results of

> your registrar's validation of format of the Whois data.

No registrar validation is done or required - we don't allow clients to submit unstructured data

Rob

---

This email has been checked for viruses by Avast antivirus software.

<https://www.avast.com/antivirus>

Posted on: 10 February 2018 01:25 AM

Dear Astutium Limited (1471),

On 20 December 2017, ICANN sent Astutium Limited the Whois Inaccuracy complaint below concerning the domain name tomzink.com and requested certain action and information by 18 January 2018. On 5 January 2018 your registrar responded. However, that response was insufficient as it did not include Whois validation and verification per the Whois Accuracy Program Specification (WAPS) under the 2013 Registrar Accreditation Agreement (RAA) and ICANN's Compliance Process. ICANN responded to clarify and request additional information on 19 January 2018. Your registrar responded on 24 January 2018, again this response was not sufficient. ICANN again requested the missing information on 29 January 2018. Your registrar responded again on 29 January 2018, again the response was missing the requested information. On 31 January 2018 ICANN sent a follow-up notice to clarify what information was still needed to resolve this complaint.

To date, your registrar has not responded to ICANN and the Whois Inaccuracy issue remains unresolved.

Please note that under the 2013 Registrar Accreditation Agreement's Whois Accuracy Program Specification, a registrar must suspend a domain name when:

- a Registered Name Holder (RNH) fails to respond to a registrar's Whois accuracy inquiries for over 15 days; or

- within 15 days of receiving such information, a registrar does not receive an affirmative response from the RNH when attempting to

Contractual Compliance  
Staff

(Third Party)

verify the RNH's email address or is unable to manually verify the allegedly inaccurate Whois information.

To demonstrate compliance, please provide ICANN the following information and records by 15 February 2018:

1. The Whois inquiries your registrar sent to the RNH regarding the alleged Whois inaccuracies in the complaint below and any responses from the RNH, including the dates, times, means of inquiries, telephone numbers, email addresses and/or postal addresses used.
2. The emails your registrar sent to the RNH and Account Holder (AH) to verify their email addresses and the affirmative responses from the RNH and AH, including the dates, times, means of responses, telephone numbers, email addresses and/or postal addresses used for the responses.
3. Indicate the option below that describes the actions taken by your registrar to address the alleged Whois inaccuracies:
  - a. Your registrar confirmed that the reported inaccuracy was corrected.
  - b. Your registrar obtained satisfactory verification from the registrant that the data was correct.
  - c. Your registrar suspended, deleted, cancelled or otherwise deactivated the domain name. If so, include the date this action was taken.
  - d. Your registrar did not investigate the inaccuracy as Section 3.7.8 of the RAA requires.
4. If any of the Whois data was updated during the course of your registrar's investigation or if the RNH has changed, provide the methods and results of your registrar's validation of format of the Whois data. Examples of standard formats include RFC 5322 for email addresses, ITU-T E.164 notation for the format of international telephone numbers and for the format of postal addresses the UPU Postal addressing format templates, the S42 address templates (as they may be updated) or other standard formats for the applicable territory. For more details please refer to the Whois Accuracy Program Specification at <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#whois-accuracy>.

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

Sincerely,

Contact information Redacted

ICANN Contractual Compliance

#####

The problem summary:



Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date

--- Error in date: Nothing to report

Problem in whois block: Technical Contact

- Error in address: Nothing to report
- Error in phone number: Phone is missing
- Error in name: No such person or entity
- Error in email: Nothing to report
- Error in fax number: Fax is missing
- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact

- Error in address: Nothing to report
- Error in name: No such person or entity
- Comment: A made-up name is entered.

Problem in whois block: Registration Date

--- Error in date: Nothing to report

Problem in whois block: Administrative Contact

- Error in address: Nothing to report
- Error in phone number: Phone is missing
- Error in name: No such person or entity
- Error in email: Nothing to report
- Error in fax number: Fax is missing
- Comment: A made-up name is entered. No phone or fax numbers.

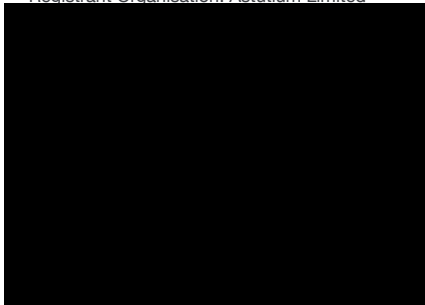
The whois at the time of processing is:

REGISTRAR WHOIS:

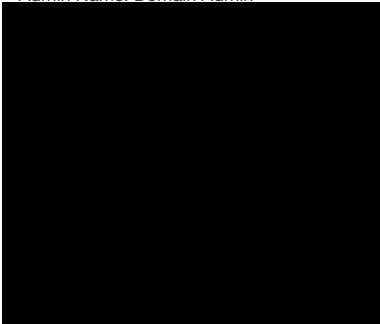
Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

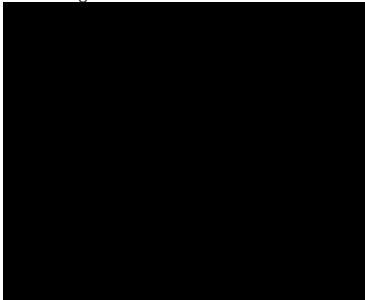
Domain Name: tomzink.com  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium-grs.com  
Registrar URL: <http://www.astutium-grs.com>  
Updated Date: 2017-08-02T7:08:06+0100  
Created Date: 2001-01-17T18:01:52+0000  
Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
Registrar Abuse Contact Phone: Not Available.  
Reseller: Registration Services Provided By Astutium Ltd  
Domain Status: REGISTERED  
Domain Status: REGISTRANT\_TRANSFER\_LOCK  
Registry Registrant ID:  
Registrant Name: NA NA  
Registrant Organisation: Astutium Limited



Registry Admin ID:  
Admin Name: Domain Admin



Registry Tech ID:  
Tech Name: Domain Admin  
Tech Organisation: Astutium Limited



Name Server: ns1.this-dns.net  
Name Server: ns2.this-dns.net  
DNSSEC: unsigned

URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>  
Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:

Domain Name: TOMZINK.COM  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium.com  
Registrar URL: <http://www.astutium.com/>  
Updated Date: 2017-08-02T06 30:05Z  
Creation Date: 2001-01-17T18:57:52Z  
Registry Expiry Date: 2018-01-17T18:57:53Z  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email:  
Registrar Abuse Contact Phone:  
Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
Name Server: NS1.THIS-DNS.NET  
Name Server: NS2.THIS-DNS.NET  
DNSSEC: unsigned  
URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
Whois Server: whois.astutium.com

#####

Posted on: 08 February 2018 06:51 PM

Dear Astutium Limited (1471),

Thank you for your response.

However, additional measures are required to be taken with concern to all Whois Inaccuracy investigations per the Whois Accuracy Program Specification (WAPS) under the 2013 Registrar Accreditation Agreement (RAA) and ICANN's Compliance Process.

In general, when a Whois Inaccuracy investigation is conducted, ICANN Compliance requests copies of correspondence between the Registrar and Registered Name Holder (RNH) from the investigation. This request is provided for by Section 3.4.3 of the 2013 RAA, and helps ICANN Compliance confirm that registrars are taking reasonable steps to investigate alleged Whois Inaccuracies, as required by Section 3.7.8 of the 2013 RAA.

In addition to this general request, the WAPS specifies certain actions registrars must take with concern to Whois Inaccuracy. Once a registrar is notified of an alleged Whois Inaccuracy, the registrar is required to verify or re-verify the email address(es) as described in Section 1.f of the WAPS. As such, ICANN requests evidence that this verification occurs during the process of investigating the alleged Whois Inaccuracies.

If the Whois data is updated following a Whois Inaccuracy investigation, the WAPS requires registrars to validate that the formats of the updated data comply with the formats specified in Sections 1(a-d) of the WAPS. Specifically, registrars are required to:

Validate the presence of data for all fields required under Subsection 3.3.1 of the Agreement in a proper format for the applicable country or territory.

Validate that all email addresses are in the proper format according to RFC 5322 (or its successors).

Validate that telephone numbers are in the proper format according to the ITU-T E.164 notation for international telephone numbers (or its equivalents or successors).

Validate that postal addresses are in a proper format for the applicable country or territory as defined in UPU Postal addressing format templates, the S42 address templates (as they may be updated) or other standard formats.

As this is a requirement specified by the WAPS, ICANN Compliance requests that registrars confirm that the validation of the updated data was conducted, and to provide the specific formats to which the updated data conforms.

Therefore, ICANN asks that your registrar please provide the following by 7 February 2018:

- copies of the correspondence between your registrar (or reseller if applicable) and the registrant, including the registrant's response and any dates, times, means of inquiries, telephone numbers, email addresses and/or postal addresses used while investigating this Whois Inaccuracy claim.

- evidence that the email verification required by the 2013 Registrar Accreditation Agreement's Whois Accuracy Program Specification occurred and an affirmative response from the Registered Name Holder (RNH) was received by your registrar.

- the method and result of your registrar's validation of format of the updated Whois data. Example of standard format: ITU-T E.164 notation for the format of international telephone numbers. For more details please refer to the Whois Accuracy Program Specification.

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

Thank you in advance for your cooperation.

Sincerely,

Contact information Redacted

ICANN Contractual Compliance

#####

The problem summary:



Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date  
--- Error in date: Nothing to report

Problem in whois block: Technical Contact  
--- Error in address: Nothing to report  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact  
--- Error in address: Nothing to report  
--- Error in name: No such person or entity  
--- Comment: A made-up name is entered.

Problem in whois block: Registration Date  
--- Error in date: Nothing to report

Problem in whois block: Administrative Contact  
--- Error in address: Nothing to report  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

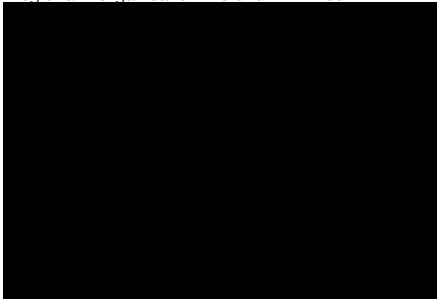
The whois at the time of processing is:

REGISTRAR WHOIS:

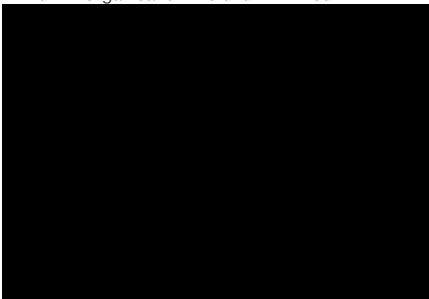
Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

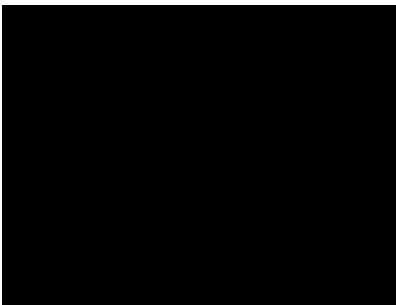
Domain Name: tomzink.com  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium-grs.com  
Registrar URL: <http://www.astutium-grs.com>  
Updated Date: 2017-08-02T7:08:06+0100  
Created Date: 2001-01-17T18:01:52+0000  
Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
Registrar Abuse Contact Phone: Not Available.  
Reseller: Registration Services Provided By Astutium Ltd  
Domain Status: REGISTERED  
Domain Status: REGISTRANT\_TRANSFER\_LOCK  
Registry Registrant ID:  
Registrant Name: NA NA  
Registrant Organisation: Astutium Limited



Registry Admin ID:  
Admin Name: Domain Admin  
Admin Organisation: Astutium Limited



Registry Tech ID:  
Tech Name: Domain Admin



Name Server: ns1.this-dns.net  
Name Server: ns2.this-dns.net  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>

Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:

Domain Name: TOMZINK.COM  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium.com  
Registrar URL: <http://www.astutium.com/>  
Updated Date: 2017-08-02T06 30:05Z  
Creation Date: 2001-01-17T18:57:52Z  
Registry Expiry Date: 2018-01-17T18:57:53Z  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email:  
Registrar Abuse Contact Phone:  
Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
Name Server: NS1.THIS-DNS.NET  
Name Server: NS2.THIS-DNS.NET  
DNSSEC: unsigned  
URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
Whois Server: whois.astutium.com

#####

Posted on: 31 January 2018 05:20 PM



(Recipient) > ICANN will  
> consider each complaint in its entirety, together with the Whois output, to  
> determine if there is sufficient information for ICANN to commence the  
> contractual compliance process.

Which you clearly failed to do

Please escalate this to your management, I do not have time to waste on this any further as you have already been told your failings in regards to the complaint report, as well as that the issue is considered closed

Rob

---  
This email has been checked for viruses by Avast antivirus software.  
<https://www.avast.com/antivirus>

Posted on: 29 January 2018 11:13 PM

Contractual Compliance Staff

Dear Astutium Limited (1471),

Thank you for your response and continuous collaboration.

(Third Party)

Please note that complaints are considered on an individual basis. ICANN will consider each complaint in its entirety, together with the Whois output, to determine if there is sufficient information for ICANN to commence the contractual compliance process. At the time when the complaint was submitted to ICANN, the Whois contact information appears to be inaccurate, for example: Registrant Name was listed as "NA NA" and there was no Phone number listed.

ICANN notes the updates in the current Whois information, however your response did not include the information requested in the Follow-up Notice. If there is a change to the Whois information following a Whois Inaccuracy investigation, Section 1(a) to (d) and 1(f) of Whois Accuracy Program Specification (WAPS) requires registrars to verify and validate the updated Whois information.

Please provide ICANN the following by 5 February 2018:

- copies of the correspondence between your registrar (or reseller if applicable) and the registrant, including the registrant's response and any dates, times, means of inquiries, telephone numbers, email addresses and/or postal addresses used while investigating this Whois Inaccuracy claim.

- the methods and results of your registrar's validation of format of the updated Whois data, or all Whois data if the Registered Name Holder (RNH) has changed. Examples of standard formats include RFC 5322 for email addresses, ITU-T E.164 notation for the format of international telephone numbers and for the format of postal addresses the UPU Postal addressing format templates, the S42 address templates (as they may be updated) or other standard formats for the applicable territory. For more details please refer to the Whois Accuracy Program Specification at <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#whois-accuracy> .

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

Thank you in advance for your cooperation.

Sincerely,

Contact information Redacted

ICANN Contractual Compliance

#####

The problem summary:



Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date  
--- Error in date: Nothing to report

Problem in whois block: Technical Contact  
--- Error in address: Nothing to report  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact  
--- Error in address: Nothing to report  
--- Error in name: No such person or entity  
--- Comment: A made-up name is entered.

Problem in whois block: Registration Date  
--- Error in date: Nothing to report

Problem in whois block: Administrative Contact  
--- Error in address: Nothing to report  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing



--- Comment: A made-up name is entered. No phone or fax numbers.

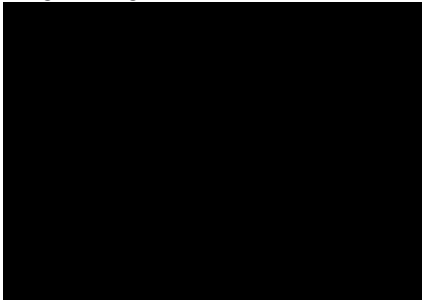
The whois at the time of processing is:

REGISTRAR WHOIS:

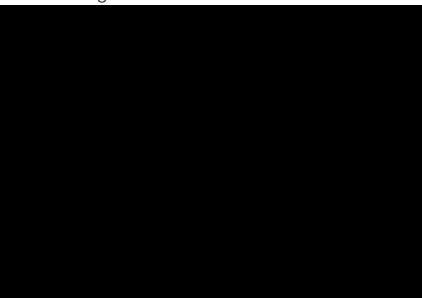
Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

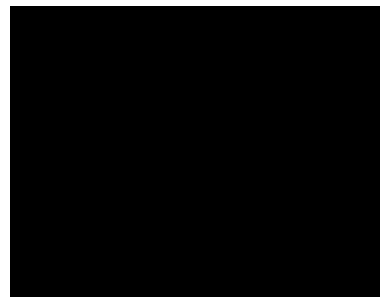
Domain Name: tomzink.com  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium-grs.com  
Registrar URL: <http://www.astutium-grs.com>  
Updated Date: 2017-08-02T7:08:06+0100  
Created Date: 2001-01-17T18:01:52+0000  
Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
Registrar Abuse Contact Phone: Not Available.  
Reseller: Registration Services Provided By Astutium Ltd  
Domain Status: REGISTERED  
Domain Status: REGISTRANT\_TRANSFER\_LOCK  
Registry Registrant ID:  
Registrant Name: NA NA  
Registrant Organisation: Astutium Limited



Registry Admin ID:  
Admin Name: Domain Admin  
Admin Organisation: Astutium Limited



Registry Tech ID:  
Tech Name: Domain Admin  
Tech Organisation: Astutium Limited



Name Server: ns1.this-dns.net  
Name Server: ns2.this-dns.net

DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>  
Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:


Domain Name: TOMZINK.COM  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium.com  
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Updated Date: 2017-08-02T06 30:05Z  
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Registrar IANA ID: 1471  
Registrar Abuse Contact Email:  
Registrar Abuse Contact Phone:  
Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
Name Server: NS1.THIS-DNS.NET  
Name Server: NS2.THIS-DNS.NET  
DNSSEC: unsigned  
URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
Whois Server: whois.astutium.com

#####

Posted on: 29 January 2018 03:47 PM

 Thank you for your response. However, your registrar's response is  
> incomplete.

(Third Party)

Your rejection of our rejection of your 'report' (because it was  
incomplete) is rejected.

If ICANN compliance are unable to do the simple job they have been  
tasked with (to correctly vet and format the queries before sending them  
on, as they have repeatedly agreed they will do "on record" at meetings)  
then Registrars have zero obligations to even look at them. Any 'lack of  
compliance' is firmly at your end and not ours in this respect.

However in this specific case we chose to look, contacted the  
registrant, and had them update/correct/check the records, as can easily  
be checked by doing a whois (whilst that archaic system is still  
semi-functional for a few more weeks before its existence is  
terminated).

Case closed.

Rob  
--  
Rob Golding [REDACTED]

\* domains \* hosting \* vps \* servers \* cloud \* backups \*

Posted on: 24 January 2018 05:50 AM

Contractual Compliance  
Staff

Dear Astutum Limited (1471),

Thank you for your response. However, your registrar's response is incomplete.

(Third Party)

Please note that verification required by the Whois Accuracy Program Specification (WAPS) is the process by which a registrar confirms or corrects the accuracy of Whois data by contacting and receiving an affirmative response from the Registered Name Holder. Validation is the process by which a registrar ensures that the format of Whois data is consistent with standards.

Please provide ICANN the following by 26 January 2018:

- copies of the affirmative response(s) that were used to verify the Registered Name Holder's (RNH) email address, as it is listed in the current Whois data for the Registrant Contact email.

- the methods and results of your registrar's validation of format of the updated Whois data, or all Whois data if the Registered Name Holder (RNH) has changed. Examples of standard formats include RFC 5322 for email addresses, ITU-T E.164 notation for the format of international telephone numbers and for the format of postal addresses the UPU Postal addressing format templates, the S42 address templates (as they may be updated) or other standard formats for the applicable territory. For more details please refer to the Whois Accuracy Program Specification at <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#whois-accuracy> .

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

Thank you in advance for your cooperation.

Sincerely,

Contact information Redacted

ICANN Contractual Compliance

#####

The problem summary:

[REDACTED]

Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date

--- Error in date: Nothing to report

Problem in whois block: Technical Contact

--- Error in address: Nothing to report

--- Error in phone number: Phone is missing

--- Error in name: No such person or entity

--- Error in email: Nothing to report

--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact

--- Error in address: Nothing to report

--- Error in name: No such person or entity

--- Comment: A made-up name is entered.

Problem in whois block: Registration Date

--- Error in date: Nothing to report

Problem in whois block: Administrative Contact

--- Error in address: Nothing to report

--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

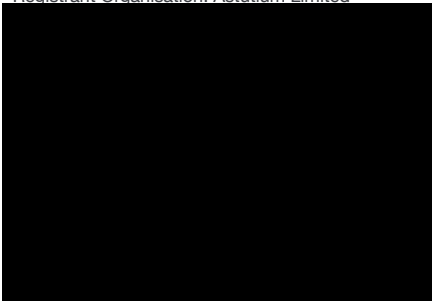
The whois at the time of processing is:

REGISTRAR WHOIS:

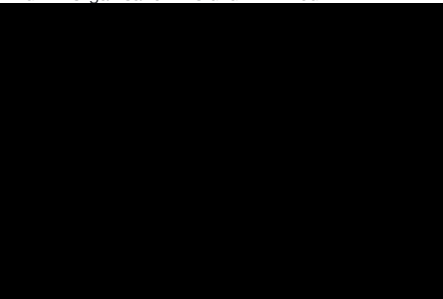
Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

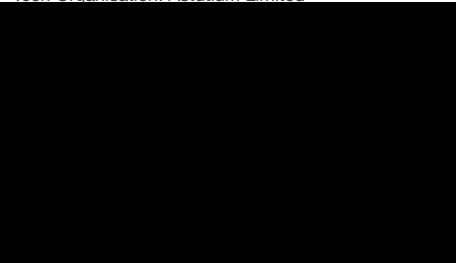
Domain Name: tomzink.com  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium-grs.com  
Registrar URL: <http://www.astutium-grs.com>  
Updated Date: 2017-08-02T7:08:06+0100  
Created Date: 2001-01-17T18:01:52+0000  
Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
Registrar Abuse Contact Phone: Not Available.  
Reseller: Registration Services Provided By Astutium Ltd  
Domain Status: REGISTERED  
Domain Status: REGISTRANT\_TRANSFER\_LOCK  
Registry Registrant ID:  
Registrant Name: NA NA  
Registrant Organisation: Astutium Limited



Registry Admin ID:  
Admin Name: Domain Admin  
Admin Organisation: Astutium Limited



Registry Tech ID:  
Tech Name: Domain Admin  
Tech Organisation: Astutium Limited



Name Server: ns1.this-dns.net  
Name Server: ns2.this-dns.net  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>  
Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:

Domain Name: TOMZINK.COM  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium.com  
Registrar URL: <http://www.astutium.com/>  
Updated Date: 2017-08-02T06 30:05Z  
Creation Date: 2001-01-17T18:57:52Z  
Registry Expiry Date: 2018-01-17T18:57:53Z  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email:  
Registrar Abuse Contact Phone:  
Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
Name Server: NS1.THIS-DNS.NET  
Name Server: NS2.THIS-DNS.NET  
DNSSEC: unsigned  
URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
Whois Server: whois.astutium.com

#####

Posted on: 19 January 2018 04:06 PM

[REDACTED] FW-625-17043]: ICANN 1st\_Notice Re:Whois\_Inaccuracy [Astutium Limited] (1471) [tomzink com]

(Third Party)

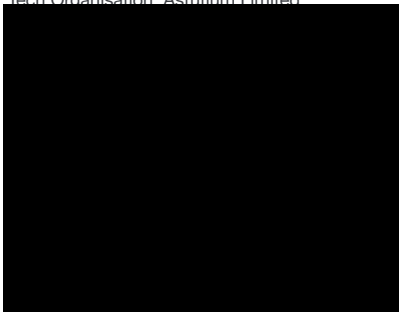
Hi

Please dont forward bigus/meaningless whois complaints which are clearly themselves totally inaccurate - for example:

Problem in whois block: Technical Contact  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

Which is all nonsense, as can be seen from the further details in the ticket you provided ...

Tech Name: Domain Admin  
Tech Organisation: Astutium Limited



No action is necessary or will be taken on bogus/incomplete/rubbish reports

Rob

Posted on: 05 January 2018 01:25 AM

process-  
tickets-who...

Dear [redacted]

(User)

Thank you for submitting a Whois inaccuracy complaint concerning the domain name tomzink.com. Your report has been entered into ICANN's database. For reference your ticket ID is: FW-625-17043.

ICANN will follow up with the registrar per process and provide you an update with its findings.

For more information about ICANN's process and approach, please visit <http://www.icann.org/en/resources/compliance/approach-processes>.

Sincerely,

ICANN Contractual Compliance

#####

The problem summary:



m

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date

--- Error in date: Nothing to report

Problem in whois block: Technical Contact

--- Error in address: Nothing to report

--- Error in phone number: Phone is missing

--- Error in name: No such person or entity

--- Error in email: Nothing to report

--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact

--- Error in address: Nothing to report

--- Error in name: No such person or entity

--- Comment: A made-up name is entered.

Problem in whois block: Registration Date

--- Error in date: Nothing to report

Problem in whois block: Administrative Contact

--- Error in address: Nothing to report

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--- Error in email: Nothing to report  
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--- Comment: A made-up name is entered. No phone or fax numbers.

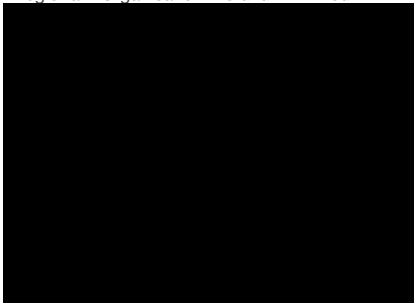
The whois at the time of processing is:

REGISTRAR WHOIS:

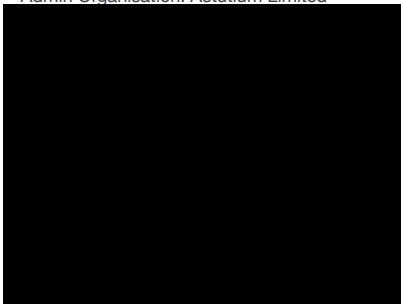
Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

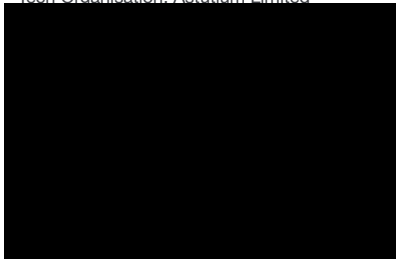
Domain Name: tomzink.com  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium-grs.com  
Registrar URL: <http://www.astutium-grs.com>  
Updated Date: 2017-08-02T7:08:06+0100  
Created Date: 2001-01-17T18:01:52+0000  
Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
Registrar Abuse Contact Phone: Not Available.  
Reseller: Registration Services Provided By Astutium Ltd  
Domain Status: REGISTERED  
Domain Status: REGISTRANT\_TRANSFER\_LOCK  
Registry Registrant ID:  
Registrant Name: NA NA  
Registrant Organisation: Astutium Limited

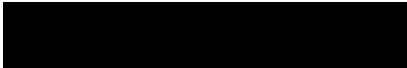


Registry Admin ID:  
Admin Name: Domain Admin  
Admin Organisation: Astutium Limited



Registry Tech ID:  
Tech Name: Domain Admin  
Tech Organisation: Astutium Limited





Name Server: ns1.this-dns.net  
 Name Server: ns2.this-dns.net  
 DNSSEC: unsigned  
 URL of the ICANN WHOIS Data Problem Reporting System:  
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An explanation of the domain statuses can be found at  
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 Registrar: Astutium Limited  
 Registrar IANA ID: 1471  
 Registrar Abuse Contact Email:  
 Registrar Abuse Contact Phone:  
 Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
 Name Server: NS1.THIS-DNS.NET  
 Name Server: NS2.THIS-DNS.NET  
 DNSSEC: unsigned  
 URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
 Whois Server: whois.astutium.com

#####

Posted on: 20 December 2017 05:40 PM

Contractual Compliance  
 Staff

Dear Astutium Limited (1471),

(Third Party)

ICANN received the Whois Inaccuracy complaint below. It claims that the contact information associated with the domain name below is inaccurate:

tomzink.com

As required under Section 3.7.8 of the 2013 Registrar Accreditation Agreement (RAA) please take reasonable steps to investigate this Whois Inaccuracy claim and, where appropriate, correct the contact information, suspend or delete the domain registration.

Additionally, as required under the Whois Accuracy Program Specification, please verify the email addresses of the Registered Name Holder (RNH) and Account Holder (AH), if different, by obtaining an affirmative response from the RNH and AH.

To demonstrate compliance, please provide ICANN the following information and records by 18 January 2018:

1. The Whois inquiries your registrar sent to the RNH regarding the alleged Whois inaccuracies in the complaint below and any responses from the RNH, including the dates, times, means of inquiries, telephone numbers, email addresses and/or postal addresses used.



2. The emails your registrar sent to the RNH and AH to verify their email addresses and the affirmative responses from the RNH and AH, including the dates, times, means of responses, telephone numbers, email addresses and/or postal addresses used for the responses.

3. Indicate the option below that describes the actions taken by your registrar to address the alleged Whois inaccuracies:

- a. Your registrar confirmed that the reported inaccuracy was corrected.
- b. Your registrar obtained satisfactory verification from the registrant that the data was correct.
- c. Your registrar suspended, deleted, cancelled or otherwise deactivated the domain name. If so, include the date this action was taken.
- d. Your registrar did not investigate the inaccuracy as Section 3.7.8 of the RAA requires.

4. If any of the Whois data was updated during the course of your registrar's investigation or if the RNH has changed, provide the methods and results of your registrar's validation of format of the Whois data. Examples of standard formats include RFC 5322 for email addresses, ITU-T E.164 notation for the format of international telephone numbers and for the format of postal addresses the UPU Postal addressing format templates, the S42 address templates (as they may be updated) or other standard formats for the applicable territory. For more details please refer to the Whois Accuracy Program Specification.

Please send the information and records requested above via reply email (no more than 4 MB total) and do not change the email subject heading. Please provide records as attachments in .TXT, .PDF, or .DOC(X) format.

For your reference, please find below the links to the RAA and Whois Accuracy Program Specification:

2013 RAA: <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm>

2013 RAA Whois Accuracy Program Specification: <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#whois-accuracy>

Thank you in advance for your cooperation.

Sincerely,

Contact information Redacted

ICANN Contractual Compliance

#####

The problem summary:



Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

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--- Error in email: Nothing to report

--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact

--- Error in address: Nothing to report

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--- Error in date: Nothing to report

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--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

The whois at the time of processing is:

REGISTRAR WHOIS:

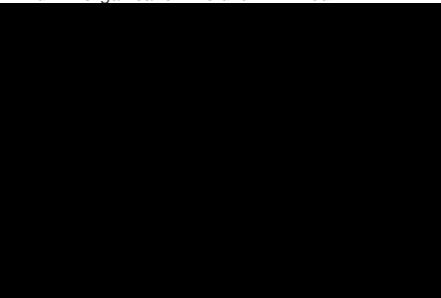
Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

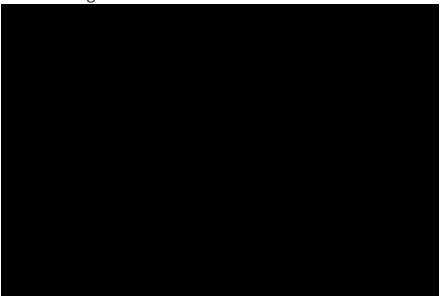
Domain Name: tomzink.com  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium-grs.com  
Registrar URL: <http://www.astutium-grs.com>  
Updated Date: 2017-08-02T7:08:06+0100  
Created Date: 2001-01-17T18:01:52+0000  
Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)  
Registrar Abuse Contact Phone: Not Available.  
Reseller: Registration Services Provided By Astutium Ltd  
Domain Status: REGISTERED  
Domain Status: REGISTRANT\_TRANSFER\_LOCK  
Registry Registrant ID:  
Registrant Name: NA NA  
Registrant Organisation: Astutium Limited



Registry Admin ID:  
Admin Name: Domain Admin  
Admin Organisation: Astutium Limited



Registry Tech ID:  
Tech Name: Domain Admin  
Tech Organisation: Astutium Limited



Name Server: ns1.this-dns.net  
Name Server: ns2.this-dns.net  
DNSSEC: unsigned

URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>  
Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:

Domain Name: TOMZINK.COM  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium.com  
Registrar URL: <http://www.astutium.com/>  
Updated Date: 2017-08-02T06 30:05Z  
Creation Date: 2001-01-17T18:57:52Z  
Registry Expiry Date: 2018-01-17T18:57:53Z  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email:  
Registrar Abuse Contact Phone:  
Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
Name Server: NS1.THIS-DNS.NET  
Name Server: NS2.THIS-DNS.NET  
DNSSEC: unsigned  
URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
Whois Server: whois.astutium.com

#####

Posted on: 20 December 2017 05:19 PM

The problem summary:

(User)

Domain being reported: tomzink.com

Time of submission/processing: Sun Dec 17 02:11:44 2017

Problem in whois block: Expiration Date  
--- Error in date: Nothing to report

Problem in whois block: Technical Contact  
--- Error in address: Nothing to report  
--- Error in phone number: Phone is missing  
--- Error in name: No such person or entity  
--- Error in email: Nothing to report  
--- Error in fax number: Fax is missing  
--- Comment: A made-up name is entered. No phone or fax numbers.

Problem in whois block: Registrant Contact  
--- Error in address: Nothing to report  
--- Error in name: No such person or entity

--- Comment: A made-up name is entered.

Problem in whois block: Registration Date

--- Error in date: Nothing to report

Problem in whois block: Administrative Contact

--- Error in address: Nothing to report

--- Error in phone number: Phone is missing

--- Error in name: No such person or entity

--- Error in email: Nothing to report

--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

The whois at the time of processing is:

REGISTRAR WHOIS:

Astutium Registration Platform WHOIS Server 1.1.9

Register your domains today at <http://www.astutium.com>

Domain Name: tomzink.com

Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN

Registrar WHOIS Server: whois.astutium-grs.com

Registrar URL: <http://www.astutium-grs.com>

Updated Date: 2017-08-02T7:08:06+0100

Created Date: 2001-01-17T18:01:52+0000

Registrar Registration Expiration Date: 2018-01-17T18:01:53+0000

Registrar: Astutium Limited

Registrar IANA ID: 1471

Registrar Abuse Contact Email: [registrar@astutium.com](mailto:registrar@astutium.com)

Registrar Abuse Contact Phone: Not Available.

Reseller: Registration Services Provided By Astutium Ltd

Domain Status: REGISTERED

Domain Status: REGISTRANT\_TRANSFER\_LOCK

Registry Registrant ID:

Registrant Name: NA NA

Registrant Organisation: Astutium Limited

Registry Admin ID:

Admin Name: Domain Admin

Admin Organisation: Astutium Limited

Registry Tech ID:

Tech Name: Domain Admin

Tech Organisation: Astutium Limited



Name Server: ns1.this-dns.net  
Name Server: ns2.this-dns.net  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System:  
<http://wdprs.internic.net/>  
Last update of WHOIS database: 2017-12-17T2:12:8+0000

An explanation of the domain statuses can be found at  
<http://www.astutium.com/whois/explain>

Now Available - VPS and Cloud Servers from <http://www.astutium.com>

REGISTRY WHOIS:

Domain Name: TOMZINK.COM  
Registry Domain ID: 52395705\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.astutium.com  
Registrar URL: <http://www.astutium.com/>  
Updated Date: 2017-08-02T06:30:05Z  
Creation Date: 2001-01-17T18:57:52Z  
Registry Expiry Date: 2018-01-17T18:57:53Z  
Registrar: Astutium Limited  
Registrar IANA ID: 1471  
Registrar Abuse Contact Email:  
Registrar Abuse Contact Phone:  
Domain Status: clientTransferProhibited  
<https://icann.org/epp#clientTransferProhibited>  
Name Server: NS1.THIS-DNS.NET  
Name Server: NS2.THIS-DNS.NET  
DNSSEC: unsigned  
URL of the ICANN Whois Inaccuracy Complaint Form:  
<https://www.icann.org/wicf/>

For more information on Whois status codes, please visit  
<https://icann.org/epp>

Registrar: Astutium Limited  
Whois Server: whois.astutium.com

Posted on: 17 December 2017 02:30 AM

**Subject:** Re: [Reconsideration Request] Urgent Reconsideration Request  
**Date:** Friday, March 30, 2018 at 4:06:25 PM Pacific Daylight Time  
**From:** reconsideration@icann.org (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Rob Golding  
**Attachments:** ATT00001.txt

Dear Mr. Golding,

This will acknowledge our receipt of Reconsideration Request 18-3, filed on behalf of Astutium Ltd. Please note that Request 18-3 is now posted on ICANN's Reconsideration page at [https://www.icann.org/resources/pages/reconsideration-18-3-astutium-request-2018-03-30-en\[icann.org\]](https://www.icann.org/resources/pages/reconsideration-18-3-astutium-request-2018-03-30-en[icann.org]). As Request 18-3 was received by ICANN organization's business day of 30 March 2018, this will be deemed the effective date of submission. We note that your email forwarding Request 18-3 indicates that it is being submitted as an "Urgent Reconsideration Request". As such, it will be processed in accordance with the process set forth under Article 4, Sections 4.2(s) and Sections 4.2(t).

The documentation will be provided to the Board Accountability Mechanisms Committee for consideration. In the event that ICANN receives additional items that relate to Request 18-3, those items will be posted on the Reconsideration page as well, and we encourage you to check back regularly for updates. ICANN will also be sending you notifications when there are updates regarding Request 18-3. We typically provide notice if there are documents (other than those submitted by the requester) that are added to the page, and we will also provide you with notice when there is any Board Accountability Mechanisms Committee recommendation and ICANN Board's final decision.

Best regards,

ICANN  
12025 Waterfront Dr., Suite 300  
Los Angeles, California 90094

On 3/29/18, 6:22 PM, "reconsider on behalf of Rob Golding" <[reconsider-bounces@icann.org](mailto:reconsider-bounces@icann.org)> on behalf of Contact Information Redacted wrote:

Please find attached a completed Urgent Reconsideration Request

Regards  
Rob  
--

Rob Golding Contact Information Redacted Astutium Ltd  
Contact Information Redacted

\* domains \* hosting \* websites \* servers \* vps \* cloud \* backups \*  
consultancy \*

---

This email has been checked for viruses by Avast antivirus software.

[https://urldefense.proofpoint.com/v2/url?u=https-3A\\_www.avast.com\\_antivirus&d=DwICAg&c=FmY1u3PJp6wrcrwl13mSVzgfkbPSS6sJms7xc14I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=AK8YAr\\_SGTMhQs1a4y1IOEzhTRQ440n87pOZ8u021B4&s=dgQunWUnnI0sHvSE00FgoyM2\\_XvRg1XSjURUeHYWAo0&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A_www.avast.com_antivirus&d=DwICAg&c=FmY1u3PJp6wrcrwl13mSVzgfkbPSS6sJms7xc14I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=AK8YAr_SGTMhQs1a4y1IOEzhTRQ440n87pOZ8u021B4&s=dgQunWUnnI0sHvSE00FgoyM2_XvRg1XSjURUeHYWAo0&e=)

**Subject:** [Reconsideration Request] Update on Reconsideration Request 18-3  
**Date:** Tuesday, April 3, 2018 at 11:39:37 AM Pacific Daylight Time  
**From:** Reconsideration (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Rob Golding  
**CC:** Reconsideration  
**Attachments:** ATT00001.txt

Dear Mr. Golding,

ICANN's Board Accountability Mechanisms Committee (BAMC) is in receipt of your reconsideration request (Request 18-3), which you identified in your cover email as an urgent request. Request 18-3 seeks reconsideration of ICANN organization's decision to terminate Astutum Limited's Registrar Accreditation Agreement (RAA) with ICANN dated 5 October 2014. As is required under the Bylaws, upon receipt of Request 18-3, the BAMC undertook to evaluate this request to determine if it should be considered on an urgent basis. (See Bylaws, [Article 4, Sections 4.2\(s\) & 4.2\(t\)\[icann.org\]](#).)

In doing so, the BAMC noticed that the Request itself does not include a "discussion of why the matter is urgent for reconsideration" as required under Article 4, Section 4.2(s) of the Bylaws. Accordingly, rather than deciding not to treat the request urgently, the BAMC wanted to provide you with the opportunity to update Request 18-3 **within two business days** to provide the requisite explanation of why the matter is urgent for consideration.

That said, recognizing that the effective date of the termination of the RAA that you are challenging is 20 April 2018, and therefore may be the basis for the urgency, the BAMC will direct ICANN organization to postpone the effective date of termination for the time being while this matter is under consideration. Accordingly, if this is the only basis for urgency, Request 18-3 may not require urgent treatment, which would provide all parties additional time to consider the matter. Of course, if there is any other basis for urgency, please let us know within two business days and the BAMC will again undertake to evaluate whether the matter should be treated on an urgent basis as required under the Bylaws.

If we do not receive a revised request or hear from you otherwise within two business days, the BAMC will process Request 18-3 as a standard reconsideration request and direct that ICANN organization postpone the effective date of termination for the time being while this matter is under consideration.

Thank you and please let us know if you have any questions.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Subject:** [Reconsideration Request] Update on Reconsideration Request 18-3  
**Date:** Wednesday, April 4, 2018 at 10:44:46 AM Pacific Daylight Time  
**From:** Reconsideration (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Rob Golding  
**CC:** Reconsideration  
**Attachments:** ATT00001.txt

Dear Mr. Golding,

Thank you for your prompt response. Pursuant to your request, we will process Request 18-3 under the standard Reconsideration process. We will retain the original submission date of 30 March 2018 as the effective date of submission.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

---

Hi

That said, recognizing that the effective date of the termination of the RAA that you are challenging is 20 April 2018, and therefore may be the basis for the urgency, the BAMC will direct ICANN organization to postpone the effective date of termination for the time being while this matter is under consideration.

Thank you.

Accordingly, if this is the only basis for urgency, Request 18 3 may not require urgent treatment, which would provide all parties additional time to consider the matter.

The specific reason for "urgent" was, as you correctly surmise, the effective date being less than 3 weeks away.



Under the circumstances you propose, I'm happy for it to be reclassified as "standard timeframe" it's no less \_important\_ (and possibly business mission critical) but not \_urgent\_ (in the sense the internet will break overnight if not resolved)

Thank you

Regards  
Rob Golding  
Astutium Ltd

**Subject:** Re: [Reconsideration Request] Reconsideration Request 18-3  
**Date:** Wednesday, June 20, 2018 at 7:41:06 PM Pacific Daylight Time  
**From:** Rob Golding (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** reconsideration@icann.org

[https://urldefense.proofpoint.com/v2/url?u=https-3A\\_\\_www.icann.org\\_resources\\_pages\\_reconsideration-2D18-2D3-2Dastutium-2D&d=DwlCAG&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=8Fy54xBsyiU-HNqNwsPeGpkY1j7wPG54qZIRuARWPrU&e=request-2018-03-30-en](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.icann.org_resources_pages_reconsideration-2D18-2D3-2Dastutium-2D&d=DwlCAG&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=8Fy54xBsyiU-HNqNwsPeGpkY1j7wPG54qZIRuARWPrU&e=request-2018-03-30-en)

Hi

Thank you to all involved in the time to evaluate and reply to the reconsideration request.

Whilst I cannot say I agree with the report (details below) and it's not the final outcome I would have expected, I am appreciative of the time and effort expended, as well as the opportunity to go through the process(es) and see how they work.

I'd also like to say a specific thank-you to Krista Papac who was highly informative about the complaints process and willing to listen to my concerns about the accountability mechanisms during our meeting in Vancouver.

Ultimately my aim has always been to have the 'final decision' questioned as completely disproportionate to the issue raised (and as far as we remain concerned no such breaches occurred so there are no grounds for termination), and the process that led to the decisions looked into so that improvements can be made, and should there still be unresolved issues, opportunity to work in a collaborative method to solve them, without the need to involve courts, lawyers, further complaints/challenge processes and so on.

Those are still my goals.

That said I have to also say I am still completely shocked that ICANN can have a department able to escalate to de-accreditation without any obvious board member oversight, stemming from a complaint about a missing fax number, which according to your own documentation is not a required field, that is very clearly present and is also the number you faxed the complaint to !

I firmly believe if someone could take a step back and look at this objectively, or even simply organised a sit-down-round-a-table with all concerned, then this could be easily solved to everyone's satisfaction in a reasonable time.

I detail my response over specific items as a rebuttal below for your consideration...

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Page #1, "I. Brief Summary. - Consistent with its approach and process,2"  
from the links at note 2 [

[The documented and expected process \(putting aside the minutiae of the complaint detail for a moment\) is that ICANN Compliance \\_talk\\_ to a registrar as part of the "3 step process"  
- indeed this has been explained to registrars at numerous presentations by compliance, that action is not taken until that has been done.](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.icann.org_resources_pages_approach-2Dprocesses-2D2012-2D02-2D25-2Den&d=DwICAg&c=FmY1u3PjP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=Dix39QUUApSLpLEMqLcAXL2s01TGjQe68Lwa6BV54&e= ]</a></p></div><div data-bbox=)

At no point during this process did ICANN Compliance speak to me at Astutium Ltd as part of this process (and they actively refused to speak to me at the recent GDD meeting)

From their own documented timeline, it shows they made calls to an invalid and incorrect number.

I find it difficult to understand how multiple staff from ICANN including ICANN Registrar Liaison Mukesh Chulani can call the correct number for me during the time-period this ticket relates to (and ICANN compliance staff have previously regarding different issues called the correct number) and got through without issue, yet over this "nuclear option" Compliance can consistently dial a non-existent/invalid number. I also note that ICANN Compliance were themselves in communication with your own staff Mukesh who had been in telephone communication with me, so exchange of my contact details should not have been onerous.

Whilst I am always incredibly busy, I am certainly not difficult to find, my number is widely circulated within ICANN and on my card(s) given to numerous ICANN staff, I am active on a number of PDPs, a member of the RRSg and an attendee at most of your meetings !

Additionally the correct number is known to ICANN compliance, and is in the "InfoSpec" document Jennifer Scott sent by email "Tue 13/03/2018 13:54"

I would consider this a major failure of the claimed and documented "consistent approach" and had the documented approach been followed I expect a very different outcome would have ensued.

From

[https://urldefense.proofpoint.com/v2/url?u=https-3A\\_\\_www.icann.org\\_en\\_system\\_files\\_files\\_reconsideration-2D18-2D3-2Dastutium-2Dba&d=DwICAg&c=FmY1u3PjP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=mNHtwetP9s02EM4teS001n8ao6QbQTLvMmHk6JWspk&e=mc-recommendation-attachment-1-05jun18-en.pdf](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.icann.org_en_system_files_files_reconsideration-2D18-2D3-2Dastutium-2Dba&d=DwICAg&c=FmY1u3PjP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=mNHtwetP9s02EM4teS001n8ao6QbQTLvMmHk6JWspk&e=mc-recommendation-attachment-1-05jun18-en.pdf)

"Then, called Rob's mobile number, however it says "This number is not recognizable""

quote from your own documentation:

"8. Primary phone number where the Registrar can be reached for contractual purposes. <sup>Contact n ormation Redacted</sup> (office) or <sup>Contact nformation Redacted</sup> (management mobile)"

which is \*NOT\* the number they tried dialling

--

Page #2, "Following unsuccessful informal resolution of the Complaint, on 27 February 2018, Contractual Compliance escalated the matter to the Formal Resolution Process3 by sending the Requestor a Breach Notice resulting from the Requestor's failure to: (i) take reasonable steps to investigate and correct claimed WHOIS inaccuracies"

This is in regards to

"As required under Section 3.7 8 of the 2013 Registrar Accreditation Agreement (RAA) please take reasonable steps to investigate this Whois Inaccuracy claim"

In order to determine what could be considered \_reasonable\_ we would need to get into the detail of the inaccuracy claim ...

From the emails from ICANN staff <sup>Contact nformation Redacted</sup>

The problem summary:

Problem in whois block: Technical Contact

--- Error in phone number: Phone is missing

--- Error in name: No such person or entity

--- Error in fax number: Fax is missing

--- Comment: A made-up name is entered. No phone or fax numbers.

With the evidence as provided by ICANN in the report for those claims being

...

Domain Name: tomzink.com

Tech Name: Domain Admin

Tech Organisation: Astutium Limited

Personal Data Redacted

Taking these in turn

taking these in turn ...

icanns' claim #1 "--- Error in phone number: Phone is missing"  
icanns' evidence #1 Redacted

The claim is from a simply visual investigation, exactly as I described it previously, clearly nonsense - the phone number is NOT missing  
Further also from a simple visual investigation, the number is in exactly the right format (as required by the contract / WAPS)  
Further from my own knowledge, the number is absolutely correct, as it is one of OUR TELEPHONE NUMBERS which gets called multiple times per day and is "attached" to our central switchboard system

icanns' claim #2 "--- Error in name: No such person or entity"  
icanns' evidence #2 "Tech Name: Domain Admin"

The claim is from a simply visual investigation, not missing and is a common/standard "role" description

For example from the whois of ICANN.ORG ...  
Tech Name: Domain Administrator  
Tech Organization: ICANN  
Personal Data Redacted

I fail to see any significant difference.

icanns' claim #3 "--- Error in fax number: Fax is missing"  
icanns' evidence #3 Personal Data Redacted

The claim is from a simply visual investigation, exactly as I described it previously, clearly nonsense - the fax number is NOT missing  
Further also from a simple visual investigation, the number is in exactly the right format (as required by the contract / WAPS)  
Further from my own knowledge (and as the BAMC report specifically notes), the number is absolutely correct, as it is OUR FAX NUMBER  
Further ICANN compliance know the number is correct and working as they faxed the complaint to it, logged that the fax had gone through and show it in your attachment1 (page14)  
Further I took the original of the fax showing your sending number and headers to the GDD meeting in Vancouver and showed it to the ICANN complaints officer  
Further the fax number is an optional field (I cannot link to your specification which shows this as the page is not a robot/404 since your recent reorganisation) - so the presence or lack of a fax number is essentially irrelevant, and outside the scope of compliance action

icanns' claim #4 "--- Comment: A made-up name is entered. No phone or fax numbers."

relates to #1, #2, #3 above

I could go on through all the other claims as they're largely a repeat of the same but for the Admin contact, but getting bogged down in the detail again rather than looking at the overall issue will not solve anything.

I would request that the ICANN board explain, document and publish what would be considered "reasonable" in the light of the above

Although being pedantic (as ICANN recently lost the court action against EPAG) that collection of the Technical Contact data etc as regards the GDPR [which has been law since May 2016 and so predates this whois complaint by 18 months] is unnecessary and illegal, and therefore should be outside the scope of compliance action.

--

Page #9, "One week before the 20 March 2018 cure deadline, on 13 March 2018, Contractual

Compliance sent a reminder email to the Requestor.<sup>50</sup> The Requestor did not respond.<sup>51</sup>"

Specifically the claim "The Requestor did not respond" - this is not correct.

The notice of (claimed) breach provided until 20th March to cure "breaches" which had mostly already been answered, or for which no cure was necessary as no breach had occurred, or (like below) had required action which had been taken.

Regarding ICANN ticket [~EDF-547-71092] for which you summarise the breach claim at the bottom of Page 8 - yes, there were previously identified questions about and errors with the WHOIS template we had used - for example ICANNs' requirements for a less-accurate timezone style than we had used.

Despite there being a defined set of time formats

([https://urldefense.proofpoint.com/v2/url?u=https-3A\\_\\_tools.ietf.org\\_html\\_rfc5732-23ref-2DW3C.REC-2DxmIschema-2D2-2D20041028&d=DwlCAg&c=FmY1u3Pjp6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=p6ZZZodXOzYtibFzQqkO4Ca1sShpJu\\_ubIP7I58Vj0I&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A__tools.ietf.org_html_rfc5732-23ref-2DW3C.REC-2DxmIschema-2D2-2D20041028&d=DwlCAg&c=FmY1u3Pjp6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=p6ZZZodXOzYtibFzQqkO4Ca1sShpJu_ubIP7I58Vj0I&e=)) which

ICANNs notice included the link to, compliance wanted it in a different

format citing a "Clarifications" document.

And we fully admit that we do appear to have missed an "advisory" at some point historically, and there had been an English vs US-English style typing error on the output.

This had been given a deadline to fix of 2nd March and was completed in advance of that date and advised to ICANN who replied with "this ticket has been closed because the issue is now being addressed in the notice of breach issued to your registrar"

There was no (remaining) breach, all of the items had been fixed or required further details from compliance [ so those had been fixed as per the request but over which we expected more information ]

Yes, I received the "reminder" on 13th March, and then spoke with ICANN staff Mukesh Chulani (my apologies if I have inadvertently spelled his name incorrectly) regarding our reply that was pending - that reply was sent by email on the 15th March (UK time, 14th March your time) - a significant amount of that email reply was cut-and-pasted into the reconsideration request and then expanded upon for that document.

So I dispute the claim of "no-response", indeed it was icann who we saw no response from, although that is not at all unusual - despite there being "deadlines" attached to demands from the compliance department, registrars are not afforded any such courtesy or regular communications (as can be seen from the compliance provided timeline)

- there are no autoreponders
- there is no registrar access to the ticket system (despite it being a standard part of the kayako software you implemented and had been promised multiple times for several years)
- this is a recurring issue as raised by the compliance sub-team of the RRSG
- as yet the community has not defined for enforcement SLAs on ICANN for such communications

I was therefore unaware ICANN were going to claim no-response and was expecting the dialog to continue, especially over the newly invented claims of breach we'd not seen prior to the letters, as they did not appear in the tickets and previous correspondence (and could prove were incorrect) until the termination notice came through the fax machine.

For example your notification of report publishing has come in marked as "SPAM" in the subject (and was therefore not visible to me prior to 10am this morning when I was advised to go hunt for it as the deadline to respond was approaching) - emails can and do go missing

--

Page #17 "other deficiencies remained, including that information in the Administrative and Technical fields (such as street names) appeared to belong to the Requestor rather than the registrant"

This is why we believe although \_a\_ process has been followed it is either the wrong process, or not fit for purpose, or perhaps just that the replies sent to ICANN have not been understood.

None of those cited would be considered "deficiencies" in any way, shape or form.

Firstly it is very possible and not at all unexpected that the Administrative and Technical contacts are those of 'Requestor' - that is because we are regularly the Administrative contacts for a clients' domain, and are by default the Technical contacts for all domains under our managed

services.

This returns to the contractual requirement to take "reasonable steps" to investigate/validate/update - what steps could be considered reasonable in regards to checking our own address ?

I was sitting there when I typed the reply to compliance - in the UK, buildings tend to be somewhat permanent rather than mobile, and the location is not subject to US extreme conditions like hurricane/earthquake/etc - offices simply do not (as a general rule) move about.

So No, no such "other deficiencies remained".

--

Page #18 "The Requestor also did not provide Contractual Compliance with evidence of the required registrant verification under WAPS Sections 1, 2 and 4 or validation under WAPS Sections 1 and 2"

[https://urldefense.proofpoint.com/v2/url?u=https-3A\\_\\_www.icann.org\\_resources\\_pages\\_approved-2Dwith-2Dspecs-2D2013-2D09-2D17-2Den-23whoi&d=DwlCAG&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=qJ-oWlLO3raLaVtjkw28-xUqectAVgazxoVdK15aAiU&e=s-accuracy](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.icann.org_resources_pages_approved-2Dwith-2Dspecs-2D2013-2D09-2D17-2Den-23whoi&d=DwlCAG&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=qJ-oWlLO3raLaVtjkw28-xUqectAVgazxoVdK15aAiU&e=s-accuracy)

s-accuracy

This continues to be ICANN staff misunderstanding the processes and systems used by most registrars, who validate data at time of entry, and do not (in very many instances) "eyeball" the data afterwards (or need to) - automation has been the industry standard for many years.

For example - Although our customer had originally entered their telephone number as "56298\*\*\*\*\*" (where \*\*\*\*\* is me redacting the last 5 character for this reply)

what we stored (and displayed when it was legal to do so) on the WHOIS, and what we auto-dialled as part of our fraud prevention systems was +1.56298\*\*\*\*\* and having already confirmed that was indeed their telephone number, the contact had been updated to show  
Registrant Phone: +1.56298\*\*\*\*\*

As already advised to both compliance and in the reconsideration request, all applicable aspects of the WAPS have been adhered to, and the checking is (in almost all cases) entirely automatic.

As per the claim on page#20 "If the Requestor does not receive an affirmative response, it "shall either verify the applicable contact information manually or suspend the registration"

Email sent:

20/12/2017 18:16 WHOIS Details Update Required -- Act Now

Affirmative response:

Date: 20/12/2017 20:01

IP Address: 75.134.\*\*.\*\* (where \*\*.\*\*\* is me redacting the last 5 character for this reply)



They confirmed (and checked/updated their data) within a more than acceptable time frame from being contacted - no manual checking/work by us as Registrar was therefore necessary

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Page #21, "Yet, during correspondence with Contractual Compliance, the Requestor never raised EU privacy law as a basis for withholding the requested information"

ICANN are well aware of their failure regarding Privacy Shield, it has been raised by a number of registrars on several occasions, and of course of the GDPR which has monopolised ICANN meetings since Copenhagen (58 ?) - your CEO formed a task-force 6 months before this WHOIS complaint to specifically deal with the issue of your contract/compliance requirements being non-compliant and illegal. Akram even blogged about it in June 2017 !

So whilst I did not specifically quote the specific details of the legislative issues, I did not think within the context of everything happening at ICANN, that it was explicitly necessary but (incorrectly) assumed it was understood.

It had been specifically raised in relation to this type of request and with the audits, with your BE office when there was registrar liaison stationed there.

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Page #24, "The Requestor claims that it complied with Section 4.1 of the ERRP because its fees are displayed on every page of its website.112 However, Contractual Compliance was unable to locate a link to the Requestor's renewal fees on its website and post-expiration renewal fees in the Requestor's registration agreement.113 "

I am not sure which part of "EVERY PAGE" is not being understood - if ICANN compliance were unable to locate the link which says "Price List" at the bottom of the page, which reads:

[quote]

Domain Name Pricing for:

Registration

Renewal

Transfer In

Transfer Out (where chargeable)

Recovery (post expiry renewal)

Redemption (post cancellation renewal)

Can all be found on the Domain Checker page

[https://urldefense.proofpoint.com/v2/url?u=https-3A\\_www.astutium.com\\_domainchecker.php&d=DwICAg&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=M8CN5IBFDU4s2eEvLfefaWGoELh6ek6tio7Polkj0o&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A_www.astutium.com_domainchecker.php&d=DwICAg&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=M8CN5IBFDU4s2eEvLfefaWGoELh6ek6tio7Polkj0o&e=)

[3A\\_www.astutium.com\\_domainchecker.php&d=DwICAg&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=M8CN5IBFDU4s2eEvLfefaWGoELh6ek6tio7Polkj0o&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A_www.astutium.com_domainchecker.php&d=DwICAg&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=M8CN5IBFDU4s2eEvLfefaWGoELh6ek6tio7Polkj0o&e=)

[coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=M8CN5IBFDU4s2eEvLfefaWGoELh6ek6tio7Polkj0o&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A_www.astutium.com_domainchecker.php&d=DwICAg&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfvwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=M8CN5IBFDU4s2eEvLfefaWGoELh6ek6tio7Polkj0o&e=)

[/quote]

then it raises the very important question (for this and several of their

other wild accusations) what website they have been looking at?

Unfortunately they do not supply any "evidence" of their breach claims - no URL, no s/shots, no information at all beyond claiming we are non-compliant when 2 minutes with a web browser on our site would prove otherwise.

Parts of the BAMC report references "not provide sufficient information as to why" - yes, there were no embedded screenshots or photographs added to the document, if additional exhibits are required or expected, please let me know and I will be happy to produce them for you or provide URLs of independent 3rd parties who have the details archived

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Page #25, "failure to publish a correspondence address on Requestor's website."

Failure to publish \*A\* correspondence address is the (false) claim I addressed in the reconsideration reply

Not as per page 25 "correspondence address on its website must be the same as the address provided in its RIS".

So, despite an attempt to claim something new now, rather than resolve what we consider an outright lie (of not having an address on our website) which is published on ICANN's site in various PDFs now ...

The RIS form (as sent by ICANN staff to me on 13 March 2018) and \_presumably\_ is the one being referred to in this now adapted claim is not the current RIS form/data - I went through the convoluted procedure of updating ICANN with new details and forms when access to RADAR was restored following ICANN's extended shutdown of the system after your security breaches, and had to involve your staff at various stages due to issues with your systems

This then (as sadly updates in RADAR tend to do) triggered weeks of having to submit new "RRA Forms" with every Registrar once ICANN notified them of updates to an address.

That you have (it would seem) failed to update/store/file the correct and updated information at your end, is (I imagine) simply another failure within ICANN or some problem with RADAR

This is especially notable as you not only send your bills (which we get) to the address on our website, and send your official communications (which is the point of the RIS data) to that address (I even took an unopened delivered one and showed it intact with the address matching the website address to your complaints officer last month)

Further it is also the address you sent the courier copy of the termination notice to, the original which I have on my other desk, which has also been shown to your staff with the address label intact - and which Fedex have confirmed you tracked the delivery of !

Claims therefore that you somehow have an old version of a form on file, and are referencing that now in the claim of breach don't hold up to any level of scrutiny.

So whilst an old RIS form you provided has a different address [which does still work for us - indeed we have multiple working addresses], that is not our current "registered office" as we have to have on-file with the UK company regulator, and which we by law have to put on our website, and according to all recent correspondence from you, is the address ICANN have for us.

Despite what feels like an attempt to alter the claim from the libellous one as published to something else, I am more than prepared to work with ICANN to ensure you correctly update your forms/systems/details/etc, although would prefer not to have several more weeks of business disruption updating forms again with registries - so will have some preconditions on how you notify other parties this time.

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For the sake of brevity and wanting to see this moved forward to a mutually satisfying conclusion rather than continuing on circular arguments , I have not gone into further details, although I can provide much more detail if requested.

I would much rather discuss with the board directly (or a representative they appoint), with a view to resolving / clarifying / answering / whatever these claims of breach and for the proposed de-accreditation to be ended and thus normal service resumed.

The offer to sit down around a table (physical or virtual) is still there and I was extremely disappointed having flown half-way across the world for the GDD and meetings that something could not have been done at that time

Regards  
Rob Golding  
Astutium Ltd

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This email has been checked for viruses by Avast antivirus software.

[https://urldefense.proofpoint.com/v2/url?u=https-3A\\_\\_www.avast.com\\_antivirus&d=DwICAg&c=FmY1u3PJp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9\\_k08WFNDSRSaBqMhDMEgQ&s=WJgcPpv60J8IN\\_gXBqzGE6MI dvKdoUayK916CPvP4tU&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.avast.com_antivirus&d=DwICAg&c=FmY1u3PJp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=Yq8kkKRfwbzb5S6uc7Zd0P6CrV6n6oSQVrGL5EQebA&m=CXN7Te8-coUOQ8MzjS9KH9_k08WFNDSRSaBqMhDMEgQ&s=WJgcPpv60J8IN_gXBqzGE6MI dvKdoUayK916CPvP4tU&e=)

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reconsider mailing list

[reconsider@icann.org](mailto:reconsider@icann.org)

<https://mm.icann.org/mailman/listinfo/reconsider>

**Subject:** FW: [~FVW-625-17043]: ICANN Notice of Breach: Astutium Limited (1471) - Failure to comply with Whois Accuracy Program Specification  
**Date:** Tuesday, March 13, 2018 at 7:12:52 AM Pacific Daylight Time  
**From:** Mukesh Chulani  
**To:** Contact Information Redacted  
**Attachments:** Notice of breach - Astutium Limited (1471) - Rr.pdf, Astutium InfoSpec.xls

Hi Rob, I hope all is well on your end. In the event you didn't receive the note below from ICANN Contractual Compliance, I'm resending it to you for your review and action prior to the noted deadline.

Best,

Mukesh

**From:** Compliance Tickets [mailto:compliance-tickets@icann.org]  
**Sent:** Tuesday, March 13, 2018 9:54 AM  
**To:** Contact Information Redacted  
**Cc:** Registrar Liaisons <registrarliaisons@icann.org>; Contact Information Redacted  
Contact Information Redacted  
**Subject:** [~FVW-625-17043]: ICANN Notice of Breach: Astutium Limited (1471) - Failure to comply with Whois Accuracy Program Specification

Dear Rob Golding,

This is a reminder that the cure date for the outstanding notice of breach is 19 March 2018. If you wish to cure the breach, please respond by that date addressing all of the items requested in the notice. Please note that failure to sufficiently address all breach items may result in escalation to suspension or termination.

Sincerely,

Contact Information Redacted  
ICANN Contractual Compliance

#####

Posted on: 27 February 2018 09:41 PM UTC  
From: [compliance-tickets@icann.org](mailto:compliance-tickets@icann.org)  
To: Contact Information Redacted  
CC To: [registrarliaisons@icann.org](mailto:registrarliaisons@icann.org)

> Dear Rob Golding,  
>  
> Attached you will find a notice of breach from ICANN regarding your registrar Astutium Limited (IANA 1471).  
>  
> Additionally, please find the Registrar Information Specification (RIS) form at <https://www.icann.org/resources/files/1188911-2015-04-24-en> should Astutium need to make updates to its current RIS form (which is also attached), to cure the breach.  
>  
> Please take immediate action and cure the breaches mentioned in the attached notice if you want to maintain your registrar's accreditation with ICANN. If you decide to cure the breach, please inform ICANN immediately at [jennifer.scott@icann.org](mailto:jennifer.scott@icann.org) when the breaches are cured.

>  
> Please contact Contact Information Redacted notice.

if you have any questions regarding this

>  
> Sincerely,

>  
Contact Information Redacted

> ICANN Contractual Compliance

>  
>

#### Ticket Details

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Ticket ID: FVW-625-17043  
Department: Whois Inaccuracy  
Type: Issue  
Status: Breach Notice  
Priority: **Normal**

## REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.2d

**TITLE:** **Consideration of Reconsideration Request 18-4**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 18-4.

Attachment A is [Reconsideration Request 18-4](#), submitted on 13 April 2018.

Attachment B is the [Ombudsman Action on Request 18-4](#), dated 21 May 2018.

Attachment C is the [BAMC Recommendation on Request 18-4](#) and Attachments [1](#) and [2](#) in support thereof, issued 14 June 2018.

Attachment D is the Requestor's [Rebuttal](#) to the BAMC Recommendation on Request 18-4, submitted on 29 June 2018.

### **Background Links**

The following links are relevant to the Board's consideration of Reconsideration Request 18-4.

Exhibits 1 to 42 submitted in support of Request 18-4 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-exhibits-1-redacted-13apr18-en.pdf>.

Exhibits 44 to 54 submitted in support of the Requestor's Rebuttal to the BAMC Recommendation on Request 18-4 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-requestor-rebuttal-exhibits-44-redacted-29jun18-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 11 July 2018

Email: amy.stathos@icann.org

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requestor Information**

Requestor:

**Name:** dotgay LLC

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requestor is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

dotgay LLC (the “Requestor”) seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 (collectively, the “Resolutions”), which accepted FTI Consulting, Inc.’s (“FTI”) three reports on its independent evaluation of the community priority evaluation process (collectively, the “CPE Process Review Reports”).<sup>1</sup>

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<sup>1</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

On 15 March 2018, the ICANN Board adopted four resolutions related to the independent review of the community priority evaluation (“CPE”) process.<sup>2</sup> The Resolutions held that the ICANN Board (1) “acknowledges and accepts the findings set forth in the three CPE Process Review Reports” (Resolution 2018.03.15.08);<sup>3</sup> (2) “concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary” (Resolution 2018.03.15.09);<sup>4</sup> (3) “declares that the CPE Process Review has been completed” (Resolution 2018.03.15.10);<sup>5</sup> and (4) “directs the Board Accountability Mechanisms Committee [(“BAMC”)] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review” (Resolution 2018.03.15.11).<sup>6</sup>

**4. Date of action/inaction:**

ICANN acted on 15 March 2018 by adopting the Resolutions.

**5. On what date did you become aware of action or that action would not be taken?**

Requestor became aware of the action on 15 March 2018, when the ICANN Board adopted

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<sup>2</sup> The ICANN Board directed its “President and CEO, or his designee(s), to undertake an independent review” of the CPE process. Exhibit 02, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>. FTI conducted its review as part of this directive.

<sup>3</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>. ICANN’s “CPE Process Review was conducted by [FTI] ... and consisted of three parts” that were discussed in three separate reports. Exhibit 03, ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>. The first report involves “reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider” (“Scope 1 Report”). *Id.* The second report involves “an evaluation of whether the CPE criteria were applied consistently throughout each CPE report” (“Scope 2 Report”). *Id.* And the third report consists of “a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests” (“Scope 3 Report”). *Id.*

<sup>4</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



the Resolutions during a public meeting of the ICANN Board.<sup>7</sup>

**6. Describe how you believe you are materially affected by the action or inaction:**

Requestor is materially and adversely affected by ICANN’s decision to adopt the Resolutions. As described further in **Section 8** below, Requestor is the community applicant for the .GAY gTLD and therefore participated in the CPE process.<sup>8</sup> Requestor seeks reconsideration of the Board Governance Committee’s (“BGC”) decision to affirm the second .GAY CPE. Requestor’s Reconsideration Request 16-3 (“RR 16-3”) raises several significant concerns about the evaluation—such as the discriminatory and inconsistent application of the CPE criteria.<sup>9</sup> FTI’s independent review of the CPE process, which includes a review of Requestor’s own CPE, serves as contrary evidence to the discrimination and inconsistency arguments in RR 16-3.<sup>10</sup> However, unlike the expert opinions supporting RR 16-3, the CPE Process Review Reports are based on a flawed methodology and insufficient substantive analysis.<sup>11</sup> Despite being aware of these problems with the CPE Process Review Reports,<sup>12</sup> the ICANN Board nonetheless fully

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<sup>7</sup> See Exhibit 04, “ICANN Board Meeting,” ICANN|61 (last visited 3 Apr. 2018), <https://61.schedule.icann.org/meetings/647631>.

<sup>8</sup> See Exhibit 05, “Community Priority Evaluation Report for .GAY” (6 Oct. 2014), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>; see also Exhibit 06, “Community Priority Evaluation Report for .GAY” (8 Oct. 2015), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>9</sup> See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (seeking reconsideration of the determination on Reconsideration Request 15-21); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (requesting reconsideration of the second .GAY CPE).

<sup>10</sup> Exhibit 09, Community Priority Evaluation Process Review Update (2 June 2017), <https://www.icann.org/news/announcement-4-2017-06-02-en>. The review determined that “the CPE Provider consistently applied the CPE criteria throughout all Community Priority Evaluations.” Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 57, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>11</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 9, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>12</sup> See *id.*; Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

“acknowledge[d] and accept[ed]” them.<sup>13</sup> It then directed the BAMC to “move forward with consideration of the remaining Reconsideration Requests relating to the CPE process,” which includes RR 16-3, in light of the Board’s decision regarding the CPE Process Review Reports.<sup>14</sup> The BAMC’s consequential reliance on the fallacious CPE Process Review Reports will directly affect its consideration of RR 16-3 and, therefore, will directly and materially affect Requestor.

The BAMC simply cannot proceed with evaluating RR 16-3 based on the Resolutions because the ICANN Board not only rubber-stamped a set of flawed reports but also violated ICANN’s Bylaws. The ICANN Board must act “consistent with procedure designed to ensure fairness, including implementing procedures to ... encourage fact-based policy development work”<sup>15</sup> The CPE Process Review Reports are based on an incomplete and unreliable universe of documents biased in favor of ICANN, as explained in **Section 8.3** below. The ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness, part of which requires ICANN to encourage fact-based work.

Furthermore, pursuant to its Bylaws, the ICANN Board must “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”<sup>16</sup> It has failed to comply with this obligation in the following ways:

1. The ICANN Board has violated its commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act[.]” It has not acted for the public benefit by accepting the conclusions of reports that rubber-stamp an evaluation process for community applicants that legal

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<sup>13</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>14</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

<sup>15</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Section, 1.2(a)(iv), <https://www.icann.org/resources/pages/governance/bylaws-en/>.

<sup>16</sup> *Id.* at Article 1, Section, 1.2.

experts, including human rights organizations, and ICANN itself has recognized as problematic—as seen in **Section 8.2** below.

2. The ICANN Board has violated its commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] promote well-informed decisions based on expert advice.”<sup>17</sup> As explained in **Section 8.2** below, the ICANN Board is aware of *several* independent experts that concluded the Economist Intelligence Unit (“EIU”) discriminatorily applied the CPE criteria and that determined the CPE Process Review Reports themselves were significantly deficient. Yet, instead, the ICANN Board supported the conclusions of *one* evaluator that employed a blatantly flawed review methodology and ignored all evidence contrary to its own conclusions.
3. The ICANN Board has violated its commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.”<sup>18</sup> Any neutral, objective, and fair examination of the CPE Process Review Reports would conclude that they are deficient, as explained in Requestor’s past submissions to the ICANN Board.<sup>19</sup> The ICANN Board has thus made a decision in contravention of the aforementioned principles by accepting FTI’s CPE Process Review Reports.
4. The ICANN Board has violated its core value to “[o]perat[e] with efficiency and excellence.”<sup>20</sup> It is evident that the knowing acceptance of a deficient independent evaluation does not constitute operating with any degree of excellence.

The ICANN Board’s decision to adopt the Resolutions, therefore, violates ICANN’s Bylaws because it knowingly adopted the flawed CPE Process Review Reports.

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<sup>17</sup> *Id.* at Article 3, Section, 3.1.

<sup>18</sup> *Id.* at Article 1, Section, 1.2(a)(v).

<sup>19</sup> Exhibit 12, Letter from A. Ali on behalf of dotguy to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>20</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Section, 1.2(b)(v), <https://www.icann.org/resources/pages/governance/bylaws-en/>.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s action materially affects the global gay community because a community-operated .GAY gTLD is necessary to provide for the community’s needs. As Professor M.V. Lee Badgett, Professor of Economics at the University of Massachusetts Amherst, explained in her expert legal opinion, the gay community still faces “stigma, discrimination, and violence around the world.”<sup>21</sup> In fact, 71 countries—comprising 37% of the United Nations—still enforce laws criminalizing same-sex behavior.<sup>22</sup>

In order to help combat these significant problems, Requestor submitted a community priority application for the .GAY gTLD. Requestor plans to operate the gTLD in order to “create an environment on the Internet that addresses important and primary needs of the Gay Community; safety, visibility, and support.”<sup>23</sup> A community-operated .GAY gTLD will (1) provide a safe space on the Internet to “encourage more community members to come out and thrive in the .gay network;” (2) promote the community’s visibility because “to be visible is to be counted and to be counted is to be relevant to society and the economy;” and (3) “support the Gay Community with access to trusted resources, as well as with funding.”<sup>24</sup> Requestor aims to achieve these goals through its operation of the .GAY gTLD; for example, Requestor has already committed to maintain “community resource websites,” establish a Registry Advisory Board to ensure that

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<sup>21</sup> Exhibit 14, Letter from A. Ali to ICANN Board, attaching the Expert Opinion of Professor M.V. Lee Badgett (17 Oct. 2016), p. 5, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

<sup>22</sup> Exhibit 15, Aengus Carroll and Lucas Ramón Mendos, “State-Sponsored Homophobia, A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition,” ILGA (May 2017), p. 37, [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf).

<sup>23</sup> Exhibit 16, “New gTLD Application Submitted to ICANN by: dotgay llc,” ICANN (13 June 2012), pp. 7-8.

<sup>24</sup> *Id.* at p. 8.

the .GAY gTLD “reflects the true needs of the community,” and “broaden its access to all members of the Global Gay Community.”<sup>25</sup>

As explained in **Section 6** above, the ICANN Board’s adoption of the Resolution materially and adversely affects Requestor’s community priority application for the .GAY gTLD. Through RR 16-3, Requestor is contesting the EIU’s discriminatory and inconsistent application of the CPE criteria to the second .GAY CPE—which denied community status to Requestor’s application.<sup>26</sup> The ICANN Board’s acceptance of the procedurally and substantively defective CPE Process Review Reports, as explained in **Section 8.3** below, will consequentially permit the BAMC to use the reports as a basis for affirming the EIU’s second .GAY CPE. By accepting the second .GAY CPE, and therefore denying Requestor community priority status, ICANN “would generate economic and social costs [for the global gay community] by creating a barrier to the development of a vibrant and successful gay economic community.”<sup>27</sup> Without community oversight, the .GAY gTLD “would become highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people,”<sup>28</sup> creating social and economic costs that “would add to the existing stigma and discrimination faced by LGBTIA people around the world.”<sup>29</sup> The ICANN Board’s action thus adversely affects the entire community for which Requestor has submitted its community priority application: the global gay community.

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<sup>25</sup> Exhibit 17, dotgay LLC, Specification 11 Public Interest Commitments (19 Feb. 2013), pp. 1-3, <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/444?t:ac=444>.

<sup>26</sup> See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (seeking reconsideration of the determination on Reconsideration Request 15-21); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (requesting reconsideration of the second .GAY CPE).

<sup>27</sup> Exhibit 14, Letter from A. Ali to ICANN Board, attaching the Expert Opinion of Professor M.V. Lee Badgett (17 Oct. 2016), p. 5, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

<sup>28</sup> *Id.* at p. 7.

<sup>29</sup> *Id.* at p. 8.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 Requestor’s Participation in the CPE Process**

Requestor submitted a community priority application for the .GAY gTLD as part of ICANN’s New gTLD Program, intending to create a safe space on the Internet for members of the gay community to communicate, engage in economic activity, and promote social change.<sup>30</sup> In order to qualify for community priority status, Requestor’s application must pass the CPE by meeting certain CPE criteria. The EIU evaluated Requestor’s application pursuant to the CPE criteria in early 2014 and determined that Requestor did not prevail as a community applicant – having only received 10 of 16 points.<sup>31</sup>

In response, Requestor, supported by multiple community organizations, filed a reconsideration request with the BGC, seeking to have its application re-evaluated by the EIU.<sup>32</sup> Among other problems with the CPE process, Requestor explained to the BGC that the EIU improperly interpreted and inconsistently applied CPE criteria.<sup>33</sup> The BGC granted the request because the EIU did not follow procedure during the CPE process. As a result, Requestor’s application was re-evaluated by the EIU.

Although the EIU again evaluated Requestor’s community priority application, it awarded the application the same score based on the same arguments.<sup>34</sup> Hence, as with the first .GAY CPE, the EIU inconsistently and discriminatorily applied the CPE criteria to Requestor’s application. For example, the EIU made the following inconsistency errors when evaluating the CPE criteria:

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<sup>30</sup> *See id.*

<sup>31</sup> Exhibit 05, Community Priority Evaluation Report for .GAY (6 Oct. 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>. In order to obtain community priority status, Requestor needed to obtain a score of 14 points. *Id.*

<sup>32</sup> *See* Exhibit 18, Revised Reconsideration Request 14-44 (29 Nov. 2014), <https://www.icann.org/en/system/files/files/request-dotgay-redacted-29nov14-en.pdf>.

<sup>33</sup> *Id.* at pp. 3-4.

<sup>34</sup> *See* Exhibit 06, Community Priority Evaluation Report for .GAY (8 Oct. 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

- The EIU inconsistently applied the CPE criteria, as set forth in the New gTLD Applicant Guidebook (“AGB”) and the CPE Guidelines, in regards to the nexus criteria. The EIU awarded .GAY zero points because it found that a “small part of the applicant’s defined community is not identified by the applied-for string.”<sup>35</sup> Yet, the EIU awarded points for the nexus criteria in the .HOTEL, .SPA, and .RADIO CPEs—all of which included entities that are not automatically associated with the gTLDs.<sup>36</sup>
- The EIU inconsistently interpreted the support criteria. Requestor received only one point because, although it had significant support from the community and its organizations, it did not have support from a single organization recognized as representing the entire community. No such organization exists. The EIU, though, awarded full points to .HOTEL and .RADIO’s community applications even though their communities also have no single representative organization.<sup>37</sup>

As a result of the problems with its second .GAY CPE, Requestor began the reconsideration request process.<sup>38</sup> This process resulted in RR 16-3, which is now pending before the BAMC.<sup>39</sup>

## 8.2 Concerns with the CPE Process

Both participants and observers of ICANN’s New gTLD Program have recognized that the CPE process is flawed. Several of them have publically expressed their concerns, particularly (1) other community priority applicants, (2) legal experts, and (3) ICANN itself.

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<sup>35</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), pp. 20-24, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>36</sup> *Id.* at pp. 39-41; Exhibit 19, Eve Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 49-50, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>37</sup> *Id.* at p. 50.

<sup>38</sup> *See* Exhibit 20, Reconsideration Request 15-21 (22 Oct. 2015), <https://www.icann.org/en/system/files/files/reconsideration-request-redacted-15-21-dotgay-22oct15-en.pdf> (requesting reconsideration of the EIU’s second .GAY CPE); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (amending Reconsideration Request 15-21); Exhibit 21, Determination of the Board Governance Committee (BGC) on Reconsideration Request 15-21 (1 Feb. 2016) <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf> (denying Amended Reconsideration Request 15-21); Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (contesting the 1 February 2016 Decision by the BGC on Amended Reconsideration Request 15-21 and asking ICANN to “set aside” the determination).

<sup>39</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en> (“the Board directs the [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review”).

Requestor is not the only participant in the CPE process that has recognized problems with the CPE. The community priority applicants for .MUSIC,<sup>40</sup> .CPA,<sup>41</sup> and .MERCK<sup>42</sup> all submitted requests for reconsideration related to their individual CPEs, having each separately found problems with the CPE process. Significantly, even community priority applicants that passed their CPE have complained about the inherent problems with the CPE. The European Broadcasting Union, which was awarded community priority status for its .RADIO application, found that the CPE process “was far from being impartial and flawless ... [with] numerous and evident inconsistencies.”<sup>43</sup>

The community priority applicants’ concerns with the CPE process are supported by legal experts. The Council of Europe, a leading human rights organization with an observer status within ICANN’s Governmental Advisory Committee (“GAC”), issued a report by its own experts that determined the EIU inconsistently applied the CPE criteria.<sup>44</sup> Two independent legal experts further criticize the CPE process. Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, performed an independent review of Requestor’s CPE and found that it (1) shows an “incomplete understanding” of the CPE’s criteria,<sup>45</sup> (2) contained “interpretive errors,” and (3) contained “errors of inconsistency and discrimination.”<sup>46</sup> Dr. Jørgen

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<sup>40</sup> See Exhibit 22, Reconsideration Request 16-5 (24 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>41</sup> See Exhibit 23, Reconsideration Request 16-8 (15 July 2016), <https://www.icann.org/resources/pages/reconsideration-16-8-cpa-australia-request-2016-07-18-en>.

<sup>42</sup> See Exhibit 24, Reconsideration Request 16-12 (25 Aug. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-a-request-redacted-25aug16-en.pdf>.

<sup>43</sup> Exhibit 25, Letter from the EBU to dotgay LLC (6 Mar. 2018), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

<sup>44</sup> Exhibit 19, Eve Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 41-57, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>45</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 74, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>46</sup> *Id.* at pp. 20-21.



Blomqvist, honorary professor of international copyright at the University of Copenhagen, also concluded that the EIU improperly applied the CPE criteria to community priority applicants as part of the CPE process.<sup>47</sup>

Even ICANN—through its Board of Directors, key participants in ICANN policy-making, and Ombudsman—has recognized that there are problems with the CPE. Cherine Chalaby, member of the ICANN Board, and Mark Carvell, Vice Chair of the GAC, have acknowledged the inconsistencies<sup>48</sup> and unfairness<sup>49</sup> in the CPE process. ICANN’s own Ombudsman examined Requestor’s CPE and found that “the EIU process should perhaps in retrospect[] have been much more open to scrutiny.”<sup>50</sup> Most significantly, in September 2016, the ICANN Board recognized the “certain concerns that some applicants have raised with the CPE process”<sup>51</sup> and “direct[ed] [its] President and CEO, or his designee(s), to undertake an independent review” of the CPE process.<sup>52</sup> Had the ICANN Board not acknowledged that problems with the CPE process existed, then they would not have initiated an independent review of the CPE process.

### **8.3 The Independent Review of the CPE Process by FTI**

ICANN’s “independent review” of the CPE process, which concluded with the acceptance of the CPE Process Review Reports, is the core issue of this reconsideration request. Despite the

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<sup>47</sup> See Exhibit 26, Expert Legal Opinion by Honorary Professor in International Copyright Dr. Jørgen Blomqvist (17 June 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>.

<sup>48</sup> Exhibit 27, ICANN, Transcript of Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, [https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2) (“I personally would comment that I have observed inconsistencies applying the (AGB) scoring criteria for (CPE)’s and ... there was an objective of producing adequate rational for all scoring decisions but I understand from feedback that this has not been achieved in all cases.”).

<sup>49</sup> *Id.* at p. 12 (“The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. That was not happening.”).

<sup>50</sup> Exhibit 28, Chris LaHatte, “Dot Gay Report” (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

<sup>51</sup> Exhibit 29, Letter from Christine Willett to Jamie Baxter (16 May 2017), p. 2, <https://www.icann.org/en/system/files/correspondence/willett-to-baxter-et-al-16may17-en.pdf>.

<sup>52</sup> Exhibit 02, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

importance of the CPE review, ICANN has been remarkably nontransparent throughout the review process.<sup>53</sup> It was not until 2 June 2017 that Requestor learned ICANN hired FTI to conduct an independent review of the CPE process.<sup>54</sup> ICANN has, and continues to, rebuff all efforts to obtain detailed information about FTI's independent review. The only substantive information available to the public about the independent review is the CPE Process Review Reports themselves, which were not published until 13 December 2017.<sup>55</sup>

Even a cursory examination of the CPE Process Review Reports reveals significant problems with the methodology adopted by FTI. ICANN represented to the Internet community that FTI will be “digging in very deeply” and that there will be “a full look at the community priority evaluation.”<sup>56</sup> As seen in the CPE Process Review Reports, however, FTI failed to meet ICANN's apparent expectations. For instance, the CPE Process Review Reports contained the following problems:

- **The CPE Process Review Reports relied upon incomplete and unreliable supporting evidence.** FTI only relied upon documents from ICANN as part of its review, since the EIU refused to produce documents and it did not accept submissions from community priority applicants.<sup>57</sup> FTI further only interviewed individuals associated with ICANN and the EIU, and those interviews were equally deficient. Even though the EIU produced no documents, FTI interviewed only two EIU staff members—and none of the

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<sup>53</sup> Requestor has previously expressed its concerns regarding the transparency of the independent review. *See* Exhibit 30, Letter from A. Ali to ICANN Board (8 Aug. 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-crocker-08aug17-en.pdf>; Exhibit 31, Reconsideration Request 17-3 (30 June 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>; Exhibit 32, Reconsideration Request 17-4 (25 July 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>; Exhibit 33, Reconsideration Request 18-2 (15 Mar. 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-request-redacted-15mar18-en.pdf>.

<sup>54</sup> Exhibit 09, Community Priority Evaluation Process Review Update (2 June 2017), <https://www.icann.org/news/announcement-4-2017-06-02-en>.

<sup>55</sup> Exhibit 03, ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>56</sup> Exhibit 34, John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, [http://sched.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf).

<sup>57</sup> *See* Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

independent evaluators, project coordinators, or project directors.<sup>58</sup> Accordingly, the CPE Process Review Reports are based only on interviews with the two EIU members, six ICANN staff members, and documents produced by ICANN.<sup>59</sup> A review based on this limited, one-sided and incomplete universe of documents cannot be considered independent.

- **The CPE Process Review Reports’ conclusions are inconsistent with other independent evaluations of the CPE.** There are a significant number of independent evaluations addressing the CPE; FTI did not address any of them, even though they all directly contradict FTI’s conclusions on the CPE process.<sup>60</sup> For example, the Independent Review Process Panel in *Dot Registry v. ICANN* determined that “ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports.”<sup>61</sup> FTI, though, concluded that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring, or conclusions reached by the CPE Provider.”<sup>62</sup> Furthermore, FTI determined that the CPE “scoring decisions were not the result of any inconsistent or disparate treatment”<sup>63</sup> without taking into consideration the expert legal opinions discussed in **Section 8.2** above, which directly contradict FTI’s conclusion and, unlike FTI, were developed after (1) re-evaluating the CPE applications; (2) relying upon the substance of the reference material; and (3) assessing the propriety or reasonableness of the research undertaken by the CPE Provider.<sup>64</sup>

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<sup>58</sup> See *id.* at pp. 7-9, 14-15; Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>59</sup> See Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 3-7, 13-14, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>60</sup> *Id.* at p. 3.

<sup>61</sup> Exhibit 43, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶ 93, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>62</sup> Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>63</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>64</sup> See Exhibit 19, Eve Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>; see also Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

- **The CPE Process Review Reports are “long on description and conclusory statements and short on actual evaluation.”**<sup>65</sup> As explained by Professor Eskridge in his Second Expert Opinion, “the approach followed by FTI was a ‘description’ of the CPE [Process Review] Reports, but not an ‘evaluation’ to determine whether the CPE Reports were actually following the applicable guidelines.”<sup>66</sup> Therefore, “[b]ecause its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as the CPEs.<sup>67</sup>

The ICANN Board was aware of the significant problems with the methodology adopted by FTI and the conclusions reached in the CPE Process Review Reports.<sup>68</sup> In fact, ICANN Board member Avri Doria even abstained from voting on the Resolutions because she could not accept the flaws with the CPE Process Review Reports:

From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. In scope 2, the analysis of the application of the criteria, while they described a rigorous methodology, the documentation describes their inability to fully apply that methodology. The report indicates that they were not able to obtain all of the required documentation from the CPE provider necessary for the full application of the process they had defined. Any scientific method, when the method cannot be rigorously applied, the results be viewed as, at best, tentative and should be treated with caution. Though FTI Consulting reports that there is no evidence of differential application of criteria, they cannot claim with certainty that there was no differential application in the absence of full and rigorous application of their chosen methodology.

It also appears in the report that only a portion of the evaluators were interviewed. In fact, the report states that FTI consulting [*sic*] only interviewed two of the evaluators from a larger set of evaluators.

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<sup>65</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 9, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>66</sup> *Id.* at p. 23.

<sup>67</sup> *Id.* at p. 25.

<sup>68</sup> *See id.*; Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

This appears to me to be another flaw in the application of their methodology.

Any definitive determination that there was no conclusive differential application of criteria would require a further in-depth study of all CPE applications and would require not only the missing documentation but also require interviewing all of the evaluators and not just the two remaining employees of the evaluation teams.<sup>69</sup>

Yet, despite the obvious procedural and substantive issues with the CPE Process Review Reports, the ICANN Board fully accepted them on 15 March 2018 through the Resolutions.

**9. What are you asking ICANN to do now?**

Requestor asks ICANN to reconsider and, subsequently, reject its decision to adopt the Resolutions. ICANN cannot acknowledge and accept the CPE Process Review Reports.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

Requestor is materially affected by the ICANN Board's decision to pass the Resolutions. As stated in **Section 8** above, Requestor is a community priority applicant for the .GAY gTLD that participated in the CPE process.<sup>70</sup> The EIU discriminatorily applied the CPE criteria when evaluating Requestor's application.<sup>71</sup> The resulting discriminatory and flawed CPE is currently

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<sup>69</sup> Exhibit 36, "SAN JUAN – ICANN Board Meeting" ICANN (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>70</sup> See Exhibit 05, "Community Priority Evaluation Report for .GAY" (6 Oct. 2014), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>; see also Exhibit 06, "Community Priority Evaluation Report for .GAY" (8 Oct. 2015), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>71</sup> See Exhibit 37, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Nov. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>; see also Exhibit 38, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the First Expert Opinion of Professor William N. Eskridge, Jr. (13 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

before the BAMC for reconsideration as part of RR 16-3.<sup>72</sup> However, FTI’s independent review of the CPE process claims that there are no problems with the CPE process. Its conclusion, as put forth in the CPE Process Review Reports, is based on a procedurally and substantively deficient independent review of the CPE process.<sup>73</sup> And, yet, the ICANN Board has decided to accept the CPE Process Review Reports through the Resolutions and conclude its investigation of the CPE process *despite being aware of the significant problems with FTI’s independent review*.<sup>74</sup> ICANN’s acceptance of FTI’s flawed independent review will directly affect the BAMC’s consideration of RR 16-3,<sup>75</sup> and therefore will directly affect Requestor.

And, further, the community that Requestor represents—the gay community—is materially affected by ICANN’s decision to accept reports that whitewash the discriminatory treatment of Requestor’s community application to operate the .GAY gTLD for the gay community.<sup>76</sup>

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<sup>72</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en> (“the Board directs the [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review”).

<sup>73</sup> See Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>; see also Exhibit 36, “SAN JUAN – ICANN Board Meeting” ICANN (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137> (ICANN Board Member Avri Doria explains that “I cannot accept the report itself. From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. ... [T]he documentation describes their inability to fully apply that methodology.”).

<sup>74</sup> Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; Exhibit 39, Letter from A. Ali on behalf of dotgay to the ICANN Board (20 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>75</sup> See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>; Exhibit 40, dotgay’s Presentation to the ICANN Board on Reconsideration Request 16-3 (15 May 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>76</sup> See Exhibit 41, Letter from National LGBT Chamber of Commerce to ICANN Board (1 Mar. 2018), <https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>; Exhibit 42, Letter from SERO to ICANN Board (18 Feb. 2018), <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, Requestor is not bringing this request on behalf of multiple persons or entities.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

This is not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

April 13, 2018

Date

**Subject:** Re: [Reconsideration Request] Reconsideration Requests 18-4  
**Date:** Monday, May 21, 2018 at 1:35:11 PM Pacific Daylight Time  
**From:** Herb Wayne (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman

Reconsideration Request 18-4

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-4.

Best regards,

Herb Wayne  
ICANN Ombudsman

<https://www.icann.org/ombudsman> [icann.org]  
<https://www.facebook.com/ICANNOmbudsman> [facebook.com]  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf> [icann.org]

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en> [icann.org]

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Saturday, May 19, 2018 at 7:20 PM  
**To:** ombudsman <ombudsman@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Requests 18-4, 18-5, and 18-6

Dear Herb,

On 13 and 14 April 2018, the following Reconsideration Requests were submitted seeking reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11, which resolved the Community Priority Evaluation (CPE) Process Review:

- Request 18-4 filed by dotgay LLC
- Request 18-5 filed by DotMusic Limited
- Request 18-6 filed by Travel Reservations SRL, Minds + Machines Group Limited,



Radix FZC, dot Hotel Inc., Registry LLC

The Requests have been published on the Reconsideration page and are also attached.

The Board Accountability Mechanisms Committee (BAMC) has determined that Requests 18-4, 18-5, and 18-6 are sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#), and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Requests 18-4, 18-5, and 18-6 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Requests 18-4, 18-5, and 18-6 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of the Requests.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-4  
14 JUNE 2018**

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The Requestor, dotgay LLC, seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.<sup>1</sup> Specifically, the Requestor claims that, “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and is inconsistent with ICANN organization’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .GAY generic top-level domain (gTLD) (Application or dotgay Application), which was placed in a contention set with three other .GAY applications.<sup>3</sup> The Requestor participated in CPE, but did not prevail (First CPE). The Requestor then challenged the First CPE results in Reconsideration Request 14-44 (Request 14-44), which the Board Governance Committee (BGC) granted and directed a re-evaluation of the Requestor’s Application. The re-evaluation of the Application (Second CPE) was not successful.<sup>4</sup> The Requestor then challenged the results of the Second CPE in

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<sup>1</sup> Request 18-4, § 3, at Pg. 1.

<sup>2</sup> Request 18-4, § 6, at Pg. 4-5.

<sup>3</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>4</sup> BGC Determination on Request 14-44, <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

Reconsideration Request 15-21, which the BGC denied.<sup>5</sup> Thereafter, the Requestor filed Reconsideration Request 16-3, challenging the BGC's denial of Request 15-21. Request 16-3 is pending evaluation by the BAMC.<sup>6</sup>

While Request 16-3 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>7</sup> The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.<sup>8</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.<sup>9</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>10</sup>

On 15 March 2018, the Board passed the Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the

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<sup>5</sup> BGC Determination on Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>6</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

<sup>7</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>8</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>9</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>10</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>11</sup>

On 13 April 2018, the Requestor submitted Request 18-4, challenging the Resolutions.<sup>12</sup> The Requestor claims that, “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and is inconsistent with ICANN org’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.<sup>13</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-4 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>14</sup>

The BAMC has considered Request 18-4 and all relevant materials and recommends that the Board deny Request 18-4 because the Board considered all material information when it adopted the Resolutions, which are consistent with ICANN’s Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.<sup>15</sup> The CPE Process Review Reports identify the materials considered by FTI.<sup>16</sup> Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.<sup>17</sup>

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<sup>11</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>12</sup> Request 18-4, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>.

<sup>13</sup> Request 18-4, § 6, at Pg. 4-5.

<sup>14</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-2, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

<sup>15</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>16</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>17</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

## II. Facts.

### A. The CPE Provider's Evaluations of the Requestor's .GAY Application.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 April 2014, the Requestor's Application was invited and the Requestor accepted to participate in CPE.<sup>18</sup>

On 6 October 2014, the CPE panel issued a "First CPE Report," concluding that the Application did not qualify for community priority.<sup>19</sup> The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report.<sup>20</sup> The BGC granted reconsideration on Request 14-44 on the grounds that the CPE Provider had inadvertently failed to verify some letters of support for the Application.<sup>21</sup> Subsequently, the CPE Provider conducted a "Second CPE" of the Application.<sup>22</sup> The Application did not prevail in the Second CPE.<sup>23</sup>

On 22 October 2015, the Requestor sought reconsideration of the Second CPE Report (Request 15-21),<sup>24</sup> and filed a DIDP Request seeking the disclosure of documents relating to the Second CPE (2015 DIDP Request).<sup>25</sup> Following ICANN org's response to the 2015 DIDP Request,<sup>26</sup> the Requestor revised Request 15-21 to include a challenge the response to the 2015

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<sup>18</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>. *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

<sup>19</sup> *See* CPE Report at 1.

<sup>20</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>21</sup> *Id.* at Pg. 2.

<sup>22</sup> *Id.* at Pg. 1.

<sup>23</sup> *Id.* at Pg. 2.

<sup>24</sup> *Id.*

<sup>25</sup> DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>26</sup> Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

DIDP Request in addition to the Second CPE Report.<sup>27</sup>

On 1 February 2016, the BGC denied Request 15-21.<sup>28</sup> On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the Second CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.<sup>29</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>30</sup>

#### **B. The CPE Process Review.**

While Request 16-3 was still pending, ICANN's Board, as part of the Board's oversight of the New gTLD Program, directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).<sup>31</sup>

Subsequently, the BGC determined that, in addition to Scope 1, the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>32</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined

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<sup>27</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>28</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>29</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>30</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>31</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>32</sup> *Id.*

that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-3, would be on hold until the CPE Process Review was completed.<sup>33</sup>

On 13 December 2017, ICANN organization published FTI's reports issued in connection with the CPE Process Review.<sup>34</sup>

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.<sup>35</sup>

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."<sup>36</sup>

For Scope 3, "FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider's working papers to the extent that such material was not otherwise cited in the final CPE report."<sup>37</sup> FTI observed that all eight of the relevant CPE reports (which are the ones at issue in the Reconsideration Requests placed on hold) referenced research. Two of the eight relevant CPE reports included citations for each reference to research. Of the remaining six relevant CPE reports, while the reports themselves did not include citations to each reference to research, in five of the six instances, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports. In the Requestor's case (for which two CPE reports were

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<sup>33</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>34</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>35</sup> Scope 1 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>36</sup> Scope 2 Report, at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>37</sup> Scope 3 Report, at Pg. 3-4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

completed, as discussed above) FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. However, FTI did find that the citation supporting the research referenced in the Second CPE Report may have been recorded in the working papers associated with the First CPE.<sup>38</sup>

On 15 March 2018, as detailed above, the Board adopted the Resolutions.<sup>39</sup> The Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),<sup>40</sup> and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).<sup>41</sup> The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.<sup>42</sup>

The Board noted that the requestors with pending reconsideration requests

each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be

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<sup>38</sup> Scope 3 Report, at Pg. 4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>39</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>. One Board member, Avri Doria, abstained from voting on the 2018 Resolutions due to concerns “about the rigor of the study and some of its conclusions.” San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>. However, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting. Id.

<sup>40</sup> Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

<sup>41</sup> 2018 Resolutions. See also Roadmap, available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

<sup>42</sup> Roadmap, at Pg. 2.



addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.<sup>43</sup>

### **C. The Requestor’s Response to the CPE Process Review.**

On 15 and 20 January 2018, the Requestor submitted letters to the Board, claiming that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.<sup>44</sup> In the 15 January 2018 letter, the Requestor asked the Board to take no action with respect to the conclusions reached by FTI until the parties have had an opportunity to respond to the CPE Process Review Reports and to be heard as it relates to their pending reconsideration requests.<sup>45</sup>

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Requestor to “submit additional information relating to Request 16-3, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the Requestor to “make a telephonic oral presentation to the BAMC in support of” Request 16-3. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-3 and that is not already covered by the written materials.”<sup>46</sup>

On 23 March 2018, the Requestor “reject[ed] BAMC’s invitation to make a telephonic presentation limited to 30 minutes” and “reject[ed] ICANN’s attempt to impose an artificial two weeks deadline” for supplemental briefing.<sup>47</sup> The Requestor reconfirmed its position on 5 April

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<sup>43</sup> *Id.*

<sup>44</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>;

<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

<sup>45</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>46</sup> Attachment 1, 19 March 2018 Email From ICANN to the Requestor.

<sup>47</sup> 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5

<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

2018.<sup>48</sup>

**D. Request 18-4.**

On 13 April 2018, the Requestor submitted Request 18-4, which challenges the Resolutions.<sup>49</sup>

**E. Relief Requested**

The Requestor asks the Board to “reconsider and, subsequently, reject its decision to adopt the Resolutions.”<sup>50</sup>

**III. Issue Presented.**

The issue is whether the Board’s adoption of the Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).

**IV. The Relevant Standards for Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.<sup>51</sup>

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<sup>48</sup> Attachment 2, 5 April 2018 Email From the Requestor to ICANN.

<sup>49</sup> Request 18-4, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>.

<sup>50</sup> *Id.*, § 9, at Pg. 15.

<sup>51</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>52</sup> Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>53</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>54</sup>

On 19 May 2018, the BAMC determined that Request 18-4 is sufficiently stated and sent Request 18-4 to the Ombudsman for review and consideration.<sup>55</sup> The Ombudsman thereafter recused himself from this matter.<sup>56</sup> Accordingly, the BAMC has reviewed Request 18-4 and issues this Recommendation.

## **V. Analysis and Rationale.**

### **A. The Resolutions Are Consistent With ICANN's Mission, Commitments, Core Values and Established ICANN Policy(ies).**

The Requestor's claims focus on the transparency, fairness, efficiency, methodology, and scope of the CPE Process Reviews. But, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN's commitment to fairness, or that the Board's action is inconsistent with ICANN's commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with

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<sup>52</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>53</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>54</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>55</sup> Ombudsman Action Regarding Request 18-4, Pg. 2, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-ombudsman-action-21may18-en.pdf>.

<sup>56</sup> Ombudsman Action Regarding Request 18-4, Pg. 1.

efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. The Requestor’s Challenges to FTI’s Methodology Do Not Warrant Reconsideration.

The Requestor claims that FTI’s methodology was flawed because: (1) the CPE Provider did not produce documents in the course of the investigation; (2) FTI did not interview any former employees of the CPE Provider; and (3) FTI did not accept materials from, or interview, CPE applicants in the course of its investigation.<sup>57</sup>

As a preliminary matter, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.<sup>58</sup> The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.<sup>59</sup> The Requestor has not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

Moreover, with respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.<sup>60</sup> FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the

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<sup>57</sup> Request 18-4, § 8, at Pg. 12-13. *See also, e.g.*, 23 March 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf> (FTI did not interview applicants); 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf> (FTI did not interview or accept materials from applicants, and “received almost no input from the CPE Provider”)

<sup>58</sup> *See, e.g.*, Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>59</sup> *See* CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>60</sup> *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

CPE process and evaluations.<sup>61</sup> Accordingly, it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider.

As noted in the CPE Process Review Reports, FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”<sup>62</sup> No policy or procedure exists that would require ICANN org to cancel the entire CPE Process Review because the CPE Provider did not produce its internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process Review.<sup>63</sup> Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.<sup>64</sup> Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has not identified a policy or procedure requiring FTI to do more because none exists. Reconsideration is not warranted on this ground.

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<sup>61</sup> See Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>62</sup> See Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>. See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services\_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>63</sup> *Id.* at Pg. 9.

<sup>64</sup> Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

With respect to the argument that FTI did not interview CPE applicants or accept materials from the applicants in the course of the review, the Requestor has not identified a policy or procedure requiring FTI to do so. While the Requestor may disagree with FTI's methodology, such disagreement is not sufficient grounds for reconsideration.

Indeed, FTI acknowledged that certain applicants had requested that they be interviewed, but explained that "such interviews are not necessary or appropriate" to the investigation.<sup>65</sup> FTI noted that neither the Applicant Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Applicant Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants. Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.<sup>66</sup> Despite that conclusion, FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.<sup>67</sup>

## 2. FTI was Not Required to Agree with the Findings of Prior Third-Party Reports.

The Requestor argues that the Board should not have accepted the findings of the CPE Process Review Reports because those findings are inconsistent with conclusions that third parties have reached concerning the CPE process.<sup>68</sup> The Requestor asserts that certain third parties, such as the former Ombudsman,<sup>69</sup> the Council of Europe (in its 4 November 2016 Report

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<sup>65</sup> *Id.* at Pg. 8.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at Pg. 8.

<sup>68</sup> Request 18-4, § 8, at Pg. 13.

<sup>69</sup> Request 18-4, § 8, at Pg. 11, quoting Ex. 28, Chris LaHatte, "Dot Gay Report" (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>. See also 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 9-10, quoting CoE Report, at Pg. 69-70 (in turn quoting Ombudsman's dotgay report).

on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (CoE Report),<sup>70</sup> and the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC (Dot Registry IRP)<sup>71</sup> all identified concerns with the CPE process that the Requestor believes are inconsistent with and not addressed in the CPE Process Review Reports. According to the Requestor, these reports—all of which were issued *before* FTI completed the CPE Process Review Reports—should be taken to mean that any conclusion *other than* that the CPE Provider’s process was inconsistent with the Applicant Guidebook and that ICANN org exerted undue influence over the CPE Provider must be incorrect.<sup>72</sup> The Requestor believes that the Board’s decision to undertake the CPE Process Review “acknowledged that problems with the CPE process existed.”<sup>73</sup>

This argument is both contrary to the facts and completely inconsistent with proper investigative methodology. First, the Association of Certified Fraud Examiners (ACFE), the anti-fraud organization that has codified the international investigative methodology that FTI followed, required that FTI form an investigative plan, collect all potentially relevant evidence and information, then analyze the relevant evidence and arrive at their conclusion based on that evidence<sup>74</sup>—not based on the opinions or investigations of prior investigators or commentators. Consistent with this methodology, FTI “carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE,” specifically allegations that

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<sup>70</sup> Request 18-4, § 8, at Pg. 10. *See also* 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 9-10, quoting CoE Report, at Pg. 69-70.

<sup>71</sup> Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-9.

<sup>72</sup> Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-10. The Requestor also points to reports that the Requestor and other CPE applicants submitted in support of their CPE applications. For the same reasons that the independent reports identified in text are not determinative of the outcome of the CPE Process Review, the CPE applicants’ expert reports are likewise not determinative. *See* Request 18-4, § 8, at Pg. 10, 13.

<sup>73</sup> Request 18-4, § 8, at Pg. 11.

<sup>74</sup> *See* Scope 1 Report at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”<sup>75</sup> Second, as noted in the CPE Process Review Reports, FTI considered all available evidence, including but not limited to, relevant IRP documents (including the Dot Registry IRP Final Declaration), relevant Reconsideration Requests (including the documents submitted in support of such Requests such as the First Eskridge and COE Reports), and the report from the Ombudsman’s Own Motion Investigation on the CPE process.<sup>76</sup>

Based upon the *evidence* available, FTI concluded that the CPE Provider applied the CPE criteria in a consistent manner, and differences in scoring outcomes “were not the result of inconsistent application of the criteria,” but rather of different underlying circumstances.<sup>77</sup>

FTI was not directed to conduct an investigation that supported (or contradicted) the Dot Registry IRP, or that supported (or contradicted) the Ombudsman’s Report, the CoE Report, applicant submissions (including expert opinions), or any other commentary on the CPE process.<sup>78</sup> Similarly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review. Rather, the review was “intended to have a positive impact on the community” and “provide greater transparency into the CPE evaluation process.”<sup>79</sup> This decision was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the process had flaws or could otherwise be improved. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to

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<sup>75</sup> Scope 3 Report, at Pg. 3.

<sup>76</sup> Scope 1 report, at Pgs. 3-6.

<sup>77</sup> *Id.*

<sup>78</sup> See Transcript of ICANN Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar, 18 January 2017, comments of M. Carvell and C. Chalaby, at Pg. 12, 20-21, *available at* [https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2).

<sup>79</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.



conducting the review in the first place. The Requestor’s arguments do not support reconsideration.

Finally, the Board’s discussion of the CPE Process Review Reports does not support reconsideration. That one Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions,”<sup>80</sup> does not render the Board vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting.<sup>81</sup>

### 3. Professor Eskridge’s Criticisms of the CPE Process Review Do Not Support Reconsideration.

The “Second Expert Opinion of Professor William N. Eskridge, Jr.” (Second Eskridge Opinion), which the Requestor submitted in support of Request 16-3 and referenced in Request 18-4,<sup>82</sup> makes several arguments criticizing the scope of the CPE Process Review:

- FTI “failed to recognize or engage the many criticisms of the [CPE Provider’s] application of ICANN’s and CPE’s guidelines to the dotgay and other applications;”<sup>83</sup>
- FTI’s conclusion that “the CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements . . . was supported by no independent analysis [and] the approach followed by FTI was a ‘description’ of the CPE Reports, but not an ‘evaluation’ to determine whether the CPE Reports were actually following the applicable guidelines;”<sup>84</sup>
- “Because its personnel simply repeated the analysis announced by the [CPE Provider] for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as those made in the CPE Reports; and<sup>85</sup>
- FTI “completely failed to examine the [CPE Provider’s] analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these

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<sup>80</sup> San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>81</sup> *Id.*

<sup>82</sup> Request 18-4, § 8, at Pg. 14.

<sup>83</sup> Second Eskridge Op., ¶ 3.

<sup>84</sup> *Id.* ¶¶ 37-38.

<sup>85</sup> *Id.* ¶ 42.

applications.”<sup>86</sup>

While these claims will be addressed as part of the BAMC and Board’s consideration of Request 16-3, it should be noted that Professor Eskridge’s primary complaint is that FTI did not re-evaluate the merits of the CPE applications or consider the substance and reasonableness of the CPE Provider’s research.<sup>87</sup> However, as discussed above, that was not what FTI was tasked to do and the Requestor provides no evidence of any policy or procedure requiring that the Board instruct FTI to re-evaluate the applications. These claims do not support reconsideration.

Additionally, the BAMC notes that the Board has already considered and rejected the Requestor’s “assertion that ‘a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.’” As the Board explained, neither the Requestor nor Professor Eskridge “offers any support for this baseless claim, and there is none.”<sup>88</sup> Therefore, reconsideration is not warranted.

#### 4. The Third-Party Letters of Support Do Not Support Reconsideration.

The BAMC has considered three letters submitted to the Board by third parties in support of the dotgay Application, criticizing the CPE Process Review.<sup>89</sup> Although all three letters express “frustration” or dissatisfaction with the findings of the CPE Process Review, none states grounds for reconsideration, nor do they identify any policy or procedures that ICANN organization or FTI violated in the course of the CPE Process Review. Accordingly, they do not support reconsideration.

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<sup>86</sup> *Id.* ¶ 76.

<sup>87</sup> Request 18-4, § 8, at Pg. 13.

<sup>88</sup> ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>89</sup> <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>;  
<https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>;  
<https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

5. The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-3.

The Requestor claims that the BAMC’s “reliance on” the CPE Process Review Reports would “directly affect its consideration of [Request] 16-3.”<sup>90</sup> When the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>91</sup> The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-3 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-3), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-3.

The BAMC will “carefully review and consider”<sup>92</sup> all of the materials that the Requestor submitted in support of Request 16-3 since 2016, including both Eskridge Opinions, the “Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay’s Community Priority Application No: 1-1713-23699” (Badgett Opinion), the CoE Report, and the ICC Determination in *ILGA v. Afiliias*, as the Requestor has asked it to do. The BAMC notes that it also provided the Requestor an opportunity to “be heard [concerning the FTI Report] as it relates to [the] pending reconsideration requests,” which the Requestor sought on 20 January 2018,<sup>93</sup> but declined to accept the opportunity when offered in March 2018.<sup>94</sup>

6. ICANN Organization Adhered to its Transparency Obligations.

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<sup>90</sup> Request 18-4, § 6, at Pg. 4.

<sup>91</sup> See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>92</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>. See also <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

<sup>93</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>94</sup> 23 March 2018 Letter from Ali to ICANN, available at <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

Finally, the Requestor asserts that ICANN organization “has been remarkably nontransparent throughout” the CPE Process Review, and “has, and continues to, rebuff all efforts to obtain detailed information about FTI’s independent review,” because the “only substantive information available to the public about the independent review is the CPE Process Review Reports themselves.”<sup>95</sup>

The Requestor has not explained how making the CPE Process Review Reports public somehow falls short of ICANN organization’s transparency obligations. The Board addressed and resolved this claim in its determination on the Requestor’s Request 18-2,<sup>96</sup> which is incorporated herein, and will not repeat itself here, except to say that the Requestor has raised no additional argument here that warrants reconsideration based on this assertion.

For all of the reasons discussed above, reconsideration is not warranted.

## **VI. Recommendation**

The BAMC has considered the merits of Request 18-4 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments and Core Values when it passed the Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-4.

Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. The first opportunity that the BAMC has to consider the Request is 14 June 2018.

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<sup>95</sup> Request 18-4, § 8, at Pg. 12.

<sup>96</sup> See BAMC Recommendation on Request 18-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.

ATTACHMENT 1 TO BAMC RECOMMENDATION

**Subject:** [Reconsideration Request] Update on Reconsideration Request 16-3  
**Date:** Monday, March 19, 2018 at 1:34:03 PM Pacific Daylight Time  
**From:** Reconsideration (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Contact Information Redacted  
**CC:** Reconsideration  
**Attachments:** ATT00001.txt

Dear Messrs. Baxter and Ali,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[icann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[icann.org\]](#) for the review the requests. In accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to submit additional information relating to Request 16-3, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-3 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30-minute telephonic presentation in March and April with your response.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

ATTACHMENT 2 TO BAMC RECOMMENDATION

**Subject:** Re: [Reconsideration Request] Update on Reconsideration Request 16-3  
**Date:** Thursday, April 5, 2018 at 1:02:50 PM Pacific Daylight Time  
**From:** Wong, Rosey (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** reconsideration@icann.org  
**CC:** Scott Seitz, Jamie Baxter, WAS DECHERT DOTGAY  
**Attachments:** ATT00001.txt

Dear ICANN:

We write in response to your April 4, 2018 email on behalf of our client, dotgay LLC (“dotgay”). The email requests that dotgay respond to several invitations from the BAMC regarding Reconsideration Request 16-3, specifically whether (1) dotgay would like to make an additional submission to the BAMC, (2) dotgay’s 31 January 2018 submission of Professor William N. Eskridge’s Second Expert Report is its supplemental submission to the BAMC, and (3) dotgay wants to make a 30 minute telephonic presentation to the BAMC.

We have responded to the BAMC’s invitations in our 23 March 2018 letter (<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>).

As we have previously made clear to the BAMC, dotgay rejects ICANN’s attempt to impose artificial constraints on any additional submissions regarding Reconsideration Request 16-3. In order to provide ICANN with further substantive comments on the CPE Process Review, dotgay must have (1) an opportunity to review the underlying documents, and is willing to enter into a confidentiality agreement to achieve that end; (2) sufficient time (at least 3 months) to review those documents; and (3) a meaningful opportunity to submit additional materials without a 10-page limit. ICANN must bear the necessary costs and expenses for dotgay to review the documents and prepare additional submissions.

The BAMC must identify its specific concerns regarding Reconsideration Request 16-3 after reviewing dotgay’s additional submission, and provide dotgay with the opportunity to make an *in-person* presentation that addresses those concerns. Furthermore, the BAMC’s review of Reconsideration Request 16-3 must involve a substantive review of the merits of the .GAY CPE report, taking into account all of the submitted materials supporting the community priority application.

We would appreciate a response from the BAMC by noon on 6 April 2018.

Sincerely,  
Rose Marie Wong

**Rose Marie Wong**  
Associate

**Dechert LLP**

Contact Information Redacted

**From:** Reconsideration <[Reconsideration@icann.org](mailto:Reconsideration@icann.org)>  
**Date:** April 4, 2018 at 7:27:00 PM EDT  
**To:** Contact Information Redacted

Contact Information Redacted

**Cc:** Reconsideration <[Reconsideration@icann.org](mailto:Reconsideration@icann.org)>  
**Subject:** Update on Reconsideration Request 16-3



Dear Messrs. Baxter and Ali,

We write to follow up on the email below, in which we noted that the BAMC invites you to submit additional information relating to Request 16-3, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is 2 April 2018. To date, we have not received a supplemental submission from you or heard from you otherwise. We note that following the publication of CPE Process Review Reports, on 31 January 2018, you submitted the "Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process." (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>). If you would like us to deem that as dotgay LLC's additional submission in response to the CPE Process Review Process pursuant to the BAMC's invitation, please advise. Or, if you intend to submit an additional submission, please advise.

In the email below, the BAMC also invited you to make a telephonic oral presentation to the BAMC in support of your reconsideration request and to let us know by 23 March if you would like to proceed with a telephonic presentation. We have also not heard from you on this issue.

Please advise by 6 April (1) whether you would like to treat the submission of 31 January 2018 as dotgay LLC's supplemental submission or if you intend to submit additional materials in support of Request 16-3 and if so, by when; and (2) whether you would like to proceed with a 30 minute telephonic presentation to the BAMC. Please include your availability for a 30-minute telephonic presentation in April and May with your response.

If we have not heard from you by 6 April 2018, we will presume that you do not intend to submit additional materials in support of Request 16-3 and that you do not wish to proceed with a telephonic presentation to the BAMC.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

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Dear Messrs. Baxter and Ali,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[jicann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[jicann.org\]](#) for the review the requests. In accordance with the [Roadmap\[jicann.org\]](#), the BAMC invites you to submit additional information relating to Request 16-3, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[jicann.org\]](#), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-3 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30-minute telephonic presentation in March and April with your response.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

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This e-mail is from Dechert LLP, a law firm, and may contain information that is confidential or privileged. If you are not the intended recipient, do not read, copy or distribute the e-mail or any attachments. Instead, please notify the sender and delete the e-mail and any attachments. Thank you.

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-4**

Requestor<sup>1</sup> submits this rebuttal to the BAMC’s Recommendation on Request 18-4 (the “**Recommendation**”).<sup>2</sup> The Recommendation affirmed the Resolutions, which adopted the CPE Process Review Reports, and raised issues that Requestor will address in this rebuttal—specifically Requestor’s position regarding the BAMC’s invitation and the ICANN Board’s violations of the ICANN’s Bylaws.

### **1. Requestor Sought a Fair Opportunity to Present Its Concerns to the BAMC**

The Recommendation misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-3. It states, without further clarification, that Requestor rejected the BAMC’s invitation to “submit additional information relating to Request 16-3” and to “make a telephonic oral presentation to the BAMC in support of Request 16-3.”<sup>3</sup> This description oversimplifies Requestor’s response to the BAMC’s limited invitation, which imposed significant constraints on Requestor’s ability to fully address Reconsideration Request 16-3 in light of the CPE Process Review Reports. For instance, the invitation limited the written submission to ten pages and the BAMC presentation to a telephonic presentation.<sup>4</sup> In response to the BAMC’s invitation, Requestor repeatedly asked for a meaningful opportunity to make additional submissions to ICANN regarding the CPE Process Review Reports.<sup>5</sup> Over three months have passed since Requestor first submitted its requests in response to the BAMC’s invitation,<sup>6</sup> but neither ICANN nor the BAMC have responded to Requestor.

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in dotgay’s Reconsideration Request 18-4. *See* Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018).

<sup>2</sup> *See* Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018).

<sup>3</sup> *Id.* at pp. 8-9.

<sup>4</sup> *See* Exhibit 46, Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process that Were Placed On Hold Pending Completion of the CPE Process Review (15 Feb. 2018); Exhibit 47, Email from R.M. Wong to ICANN Board (5 Apr. 2018).

<sup>5</sup> *Id.*; Exhibit 48, Letter from A. Ali to C. Chalaby and C. Disspain (23 Mar. 2018), pp. 4-5. Requestor made several other requests in response to the BAMC’s invitation. *See id.* (listing seven requests).

<sup>6</sup> *See id.*

## 2. The ICANN Board Failed to Comply with the ICANN Bylaws

As explained in Reconsideration Request 18-4 (“**Request 18-4**”), the ICANN Board failed to comply with the ICANN Bylaws.<sup>7</sup> Pursuant to the Bylaws, the ICANN Board must (1) “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act”<sup>8</sup> and “promote well-informed decisions based on expert advise;”<sup>9</sup> (2) “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment;”<sup>10</sup> and (3) “encourage fact-based policy development work.”<sup>11</sup> The ICANN Board failed to adhere to these requirements when it adopted the Resolutions. The Recommendation, however, supports the ICANN Board’s clear violations of these obligations and, in doing so, makes several misstatements that Requestor corrects below.<sup>12</sup>

### A. Requestor Presented Significant Evidence that the ICANN Board Violated Its Bylaws by Adopting the Resolutions

Request 18-4 provides sufficient evidence that the ICANN Board failed to comply with its obligations under the ICANN Bylaws. The Recommendation contends that “Requestor provides no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s [other] commitments.”<sup>13</sup> Yet, even within Request 18-4, Requestor provided ICANN with significant evidence supporting its claims, such as the Expert Opinions of Persona Data Redacted; the Council of Europe’s report; and the former ICANN Ombudsman’s “Dot Gay Report.”<sup>14</sup> These documents clearly constitute evidence supporting

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<sup>7</sup> See generally Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018).

<sup>8</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Art. 1, Section 1.2(a)(iv).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at Article 1, Section, 1.2(a)(v).

<sup>11</sup> *Id.* at Article 1, Section, 1.2(a)(iv).

<sup>12</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), pp. 10-19.

<sup>13</sup> *Id.* at p. 10.

<sup>14</sup> See, e.g., Exhibit 38, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the First Expert Opinion of Professor William N. Eskridge, Jr. (13 Sep. 2016); Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board,

Requestor’s concerns about the CPE Process Review and the ICANN Board’s adoption of the CPE Process Review Reports.<sup>15</sup>

ICANN has prevented Requestor from obtaining additional evidence by refusing to disclose any documents related to the independent review in violation of its commitment to transparency. ICANN is required to operate “through open and transparent processes.”<sup>16</sup> Although the Recommendation denies that ICANN violated this obligation,<sup>17</sup> ICANN has continually refused to disclose relevant documents that would likely provide additional evidence in support of Requestor’s concerns.<sup>18</sup> Requestor has already explained how ICANN has failed to comply with its commitment to act with transparency in its prior submissions to ICANN, and incorporates those submissions herein.<sup>19</sup>

## **B. FTI’s Methodology for the CPE Process Review Is Materially Flawed**

The Recommendation also misconstrues Requestor’s concerns about the ICANN Board’s actions by focusing on one simple, meaningless argument: “The Requestor has not identified a policy or procedure requiring FTI to do more because none exists.”<sup>20</sup> Requestor has not argued that the ICANN Board breached its obligations because FTI failed to comply with a non-existent ICANN policy or procedure or because ICANN failed “to develop a particular methodology for

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attaching the Second Expert Opinion of Personal Data Redacted (31 Jan. 2018); Exhibit 19, Personal Data Redacted “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017); Exhibit 28, Personal Data Redacted “Dot Gay Report” (27 July 2016).

<sup>15</sup> See Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 11 (describing Requestor’s Reconsideration Requests, Personal Data Redacted, the Council of Europe Report, and the former ICANN Ombudsman’s Report as “evidence”).

<sup>16</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Sections 1.2(a), 1.2(b)(ii) (ICANN must “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are countable and transparent.”).

<sup>17</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 19.

<sup>18</sup> See Exhibit 49, Response to Request No. 20180115-1 (14 Feb. 2018); see also Exhibit 50, Response to Request No. 20170610-1 (10 July 2017); Exhibit 51, Response to Request No. 20170518-1 (18 June 2017).

<sup>19</sup> See Exhibit 30, Letter from A. Ali to ICANN Board (8 Aug. 2017); Exhibit 31, Reconsideration Request 17-3 (30 June 2017); Exhibit 32, Reconsideration Request 17-4 (25 July 2017); Exhibit 33, Reconsideration Request 18-2 (15 Mar. 2018).

<sup>20</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), pp. 11-13.

the CPE Process Review.”<sup>21</sup> Rather, as described in Request 18-4, Requestor has argued that the ICANN Board’s actions violate the ICANN Bylaws because FTI improperly implemented its review methodology in conducting the CPE Process Review.<sup>22</sup> This resulted in a methodologically flawed set of reports on the CPE process. The ICANN Board violated the ICANN Bylaws because it clearly failed to make a well-informed decision and to fairly apply its documented policies by adopting the flawed CPE Process Review Reports through the Resolutions.

Although FTI adopted a review standard for its independent review of the CPE process, it failed to adhere to this standard—resulting in methodologically flawed CPE Process Review Reports.<sup>23</sup> According to the Recommendation, the ICANN Board “relied on FTI to develop an appropriate methodology” for the review.<sup>24</sup> FTI adopted the “international investigative methodology” from the Association of Certified Fraud Examiners’ (“ACFE”) for the CPE Process Review.<sup>25</sup> As FTI explained in the CPE Process Review Reports, pursuant to the ACFE’s methodology, FTI was required to (1) formulate an investigative plan that identifies sources of relevant materials; (2) collect and review “*all* potentially relevant materials and documentation;” (3) interview relevant individuals deemed to have knowledge pertinent to the subject being investigated; (4) compare that documents with the interview information, which frequently results in follow-up interviews; and (5) re-analyze the documentation to prepare for writing the investigation report.<sup>26</sup> FTI failed to adhere to both this methodology and the ACFE’s guiding standards for such investigations.

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<sup>21</sup> *Id.* at p. 11.

<sup>22</sup> *See id.*

<sup>23</sup> Requestor reserves the right to contest FTI’s choice of investigative methodology for the CPE Process Review, which is not at issue in Request 18-4.

<sup>24</sup> *Id.* at p. 11.

<sup>25</sup> *Id.* at p. 14.

<sup>26</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 4 (emphasis added).

**First**, FTI failed to obtain and review “all potentially relevant materials and documentation”<sup>27</sup> as part of its independent review. The ACFE’s Code of Professional Standards requires that FTI “*obtain evidence and information that is **complete, reliable and relevant.***”<sup>28</sup> However, FTI based its independent review of the CPE Process Review Reports on information solely obtained from ICANN and the CPE Provider—the two organizations being reviewed—even though FTI could have obtained a significant amount of additional relevant information from the community applicants.<sup>29</sup> This information was not even complete. In response to FTI’s information requests, the CPE Provider refused to send FTI relevant documents, such as internal emails “relating to the CPE process and evaluations” among the CPE “evaluators.”<sup>30</sup> FTI did nothing in response to this refusal, and simply proceeded with its review without accounting for this missing information.

**Second**, FTI failed to interview all of the relevant individuals with “knowledge pertinent to the subject being investigated.”<sup>31</sup> FTI had the capability to review the community applicants affected by the CPE Provider’s CPEs, but refused to talk with any of the applicants. FTI’s chosen excuse for refusing to obtain additional evidence from the community applicants, that the CPE Provider “evaluated applications ... without additional input from applicants,”<sup>32</sup> is inexcusable. FTI was tasked with reviewing the CPEs to determine whether the “CPE criteria were applied consistently throughout each CPE report.”<sup>33</sup> It was not restrained by either the New gTLD Program Applicant Guidebook or the CPE Guidelines.

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<sup>27</sup> *Id.*

<sup>28</sup> Exhibit 52, CFE Code of Professional Standards Interpretation and Guidance, p. 8 (emphasis added).

<sup>29</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

<sup>30</sup> *Id.* at pp. 7-8.

<sup>31</sup> *Id.* at p. 4.

<sup>32</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 13.

<sup>33</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 1.

Since FTI refused to interview the community applicants, the CPE Process Review Reports only relied on interviews with ICANN and CPE Provider staff.<sup>34</sup> FTI’s blanket acceptance of declarations made by ICANN and the CPE Provider is a significant problem as it does not consider “*the possibility of conjecture, unsubstantiated opinion and bias of witnesses and others*” in accordance with ACFE standards.<sup>35</sup> As explained above, FTI simply accepted that the documents and interview statements were accurate and free of bias—despite being from the organizations under review. Instead of critically examining this evidence, FTI (1) did not question the information from ICANN and the CPE Providers; (2) refused to address the significant amount of contrary findings from third parties; and (3) excluded evidence that provided a contrary viewpoint to ICANN and the CPE Provider by deliberately choosing not to interview applicants.<sup>36</sup> FTI thus based the CPE Process Review Reports on a purely one-sided representation of the CPE process in clear violation of the ACFE standards.

**Third,** FTI further did not exercise due professional care in conducting the CPE Process Review. In accordance with ACFE standards, FTI was required to discharge its professional responsibilities with “*diligence, critical analysis and professional skepticism.*”<sup>37</sup> FTI failed to achieve this objective because it simply accepted statements and information without further investigation or critical analysis. This is clearly exemplified in the third part of the CPE Process Review Reports, where FTI simply compiled the reference materials relied upon by the CPE Provider for the CPE Reports to conduct a cite-checking exercise.<sup>38</sup> FTI was *only* concerned with

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<sup>34</sup> Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 3-9.

<sup>35</sup> Exhibit 52, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

<sup>36</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

<sup>37</sup> Exhibit 52, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

<sup>38</sup> See generally Exhibit 53, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017).



determining whether the “reference[s] to the CPE Panel’s research” were reflected in the actual cited materials, *and not whether the underlying referenced research was true or accurate*.<sup>39</sup>

FTI clearly failed to critically analyze the information that it received, simply accepting the information as true without exercising any professional skepticism. This is evident in its interviews of the CPE Provider’s personnel as well. FTI interviewed only two CPE Provider personnel from the “core team.”<sup>40</sup> The independent evaluators examined a community application and applied the CPE criteria.<sup>41</sup> The core team simply met to discuss the evaluators’ completed work and helped resolve and different conclusions between the evaluators.<sup>42</sup> Despite the limited influence the two interviewees had in scoring the community applications, FTI accepted their broad statements as universally true for the entire evaluation process. For instance, based on the two interviews, FTI asserted the CPE Provider stated that “they were strict constructionists and used the Applicant Guidebook as their ‘bible’. Further, the CPE Provider states that it relied first and foremost on material provided by the applicant.”<sup>43</sup> These generalizations are clearly unreliable as they are based on claims made by two CPE core team members on the evaluation process under the purview of the independent evaluators.

FTI clearly failed to adhere to the methodology that it *chose to adopt* for the CPE Process Review Reports. By ignoring these failures in order to adopt the CPE Process Review Reports

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<sup>39</sup> See *id.* at pp. 14-57.

<sup>40</sup> Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8 (distinguishing between the core team and the independent evaluators); see also Exhibit 54, Economist Intelligence Unit, “Community Priority Evaluation Panel and its Processes” (7 Aug. 2104) (“The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”).

<sup>41</sup> Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8.

<sup>42</sup> *Id.* at pp. 8-9.

<sup>43</sup> *Id.* at p. 15.

and attempt to justify the CPE Provider’s clearly discriminatory application of the CPE criteria in the CPE Reports, the ICANN Board violated its Bylaws-imposed obligations.

### C. The CPE Process Review Reports Are Substantively Flawed

The Recommendation further misconstrues Requestor’s concerns about the substance of the CPE Process Review Reports. It argues that (1) “FTI was Not Required to Agree with the Findings of Prior Third-Party Reports;”<sup>44</sup> and (2) “FTI was not directed to conduct an investigation that supported (or contradicted)” the independent evaluations.<sup>45</sup> Neither of these statements properly describe Requestor’s concerns with the CPE Process Review Reports. Requestor is not stating that FTI was *required* to fully agree with the independent authority.<sup>46</sup> Rather, Requestor argues that FTI’s review was substantively flawed because it did not *address* any of the relevant independent evaluations, regardless of whether ICANN directed FTI to support or contradict them, and instead ignored their existence rather than rebut their conclusions.<sup>47</sup> By failing to consider divergent views on the CPE Process, FTI produced a series of substantially flawed reports. The ICANN Board could not have adopted the CPE Process Review Reports without violating its obligation to act for the public benefit, make well-informed decisions based on expert advice, and apply documented policies consistently, neutrally, objectively, and fairly.

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<sup>44</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), pp. 13-14. The Recommendation stresses that these independent evaluations were issued before FTI completed the CPE Process Review, as if this fact renders them irrelevant to FTI. *Id.* Rather, the fact that these evaluations occurred “*before* FTI completed the CPE Process Review Reports” only further emphasizes that FTI needed to properly address them in the review. *Id.* at p. 14.

<sup>45</sup> *Id.* at p. 15.

<sup>46</sup> Requestor believes that FTI reached the wrong conclusions in the CPE Process Review Reports, and reserves the right to contest its conclusions. Request 18-4, though, clearly states that the CPE Process Review Reports are substantively flawed because “[t]here are a significant number of independent evaluations addressing the CPE; FTI did not address any of them, even though they all directly contradict DTI’s conclusions on the CPE process.” Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018), p. 13.

<sup>47</sup> FTI only states that it “carefully considered the *claims* raised in Reconsideration Requests and Independent Review Process ... proceedings” and the “*claim* that certain of the CPE criteria were applied inconsistently across the various CPEs.” Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 3 (emphasis added). These simple declarations do not address the independent authority directly contradicting FTI’s conclusions.

### 3. Conclusion

Therefore, it is clear that ICANN failed to comply with its Bylaws in passing the Resolutions. The BAMC further perpetuated this violation by recommending that the Board deny Request 18-4.<sup>48</sup> In addition to the reasons stated in the Request 18-4,<sup>49</sup> the Board should grant Request 18-4 and reject the CPE Process Review Reports.



Arif Hyder Ali

29 June 2018

Date

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<sup>48</sup> In its Recommendation, the BAMC noted that it “will consider the CPE Process Review Reports in the course of its evaluation of Request 16-3 ... but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-3. The BAMC will ‘carefully review and consider’ all of the materials that the Requestor submitted in support of Request 16-3 since 2016, including both *Personal Data Red* Opinions, the [Badgett Opinion], the CoE Report, and the ICC Determination in *ILGA v. Afilias*, as the Requestor has asked it to do.” Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 18. Requestor appreciates this assurance from the BAMC.

<sup>49</sup> See generally Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018).

## REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.XX

**TITLE:** **Consideration of Reconsideration Request 18-5**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 18-5.

Attachment A is [Reconsideration Request 18-5](#), submitted on 14 April 2018.

Attachment B is the [Ombudsman Action on Request 18-5](#), dated 21 May 2018.

Attachment C is the [BAMC Recommendation on Request 18-5](#) and Attachments [1](#) and [2](#) in support thereof, issued 14 June 2018.

Attachment D is the Requestor's [Rebuttal](#) to the BAMC Recommendation on Request 18-5, submitted on 29 June 2018.

### **Background Links**

The following links are relevant to the Board's consideration of Reconsideration Request 18-5.

Exhibits 1 to 31 submitted in support of Request 18-5 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-exhibits-1-redacted-14apr18-en.pdf>.

Exhibits 32 to 43 submitted in support of the Requestor's Rebuttal to the BAMC Recommendation on Request 18-5 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-requestor-rebuttal-exhibits-32-redacted-29jun18-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 12 July 2018

Email: amy.stathos@icann.org

## **DotMusic Limited Reconsideration Request (“RR”)**

April 14, 2018

### **1. Requestor Information**

Requestors:

**Name:** DotMusic Limited

**Address:** Contact Information Redacted

**Email:** Constantinos Roussos, Contact Information Redacted

Requestor is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

DotMusic Limited (“Requestor”) seeks reconsideration of the ICANN Board’s four resolutions, which concern the community priority evaluation (“CPE”) process review that was conducted by FTI Consulting, Inc.’s (“FTI”) Global Risk and Investigations Practice and

Technology Practice (the “CPE Review”).<sup>1</sup> The ICANN Board adopted the following resolutions on 15 March 2018:<sup>2</sup>

Resolved (2018.03.15.08), the Board acknowledges and accepts the findings set forth in the three CPE Process Review Reports.

Resolved (2018.03.15.09), the Board concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary.

Resolved (2018.03.15.10), the Board declares that the CPE Process Review has been completed.

Resolved (2018.03.15.11), the Board directs the Board Accountability Mechanisms Committee [(“BAMC”)] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC [PDF, 42 KB] document.<sup>3</sup>

**4. Date of action/inaction:**

ICANN acted on 15 March 2018 by adopting resolutions 2018.03.15.08 through 2018.03.15.11 (the “Resolutions”).

**5. On what date did you become aware of action or that action would not be taken?**

Requestor became aware of the action on 15 March 2018, when the ICANN Board adopted the Resolutions.

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<sup>1</sup> Exhibit 01, Adopted ICANN Board Resolutions (15 Mar. 2018), 2a, <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

**6. Describe how you believe you are materially affected by the action or inaction:**

Requestor is materially affected by the Resolutions, which accept the findings of the CPE Review, because the BAMC intends to rely on the CPE Review to decide Requestor's Reconsideration Request 16-5 ("Request 16-5"). The BAMC's reliance on the procedurally and substantively deficient CPE Review directly affects Requestor's rights regarding its community priority application for the .MUSIC generic top-level domain ("gTLD"), which is the focus of Request 16-5. The ICANN Board's adoption of the Resolutions will materially affect and harm Requestor, and its Request 16-5, because (1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN's Bylaws.

**6.1 The CPE Review is Procedurally and Methodologically Deficient.**

The ICANN Board adopted the Resolutions despite the facially deficient methodology underlying the CPE Review. FTI, in performing its independent review of the CPE process, only relied upon documents from ICANN as part of its review, since the CPE Provider refused to produce documents and it did not accept submissions from community priority applicants.<sup>4</sup> Furthermore, FTI only interviewed individuals associated with ICANN and the CPE Provider and those interviews were equally deficient. For example, even though the CPE Provider produced no documents, FTI interviewed only two of its staff members and none of its independent evaluators, project coordinators, or project directors.<sup>5</sup> No interviews were requested or conducted of any person at DotMusic or any of its experts who have submitted extensive reports for the BAMC's consideration. Accordingly, the CPE Review is based only on interviews with the two CPE

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<sup>4</sup> Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>5</sup> *Id.* at pp. 8-10, 14-15.

Provider staff members, six ICANN staff members, and documents produced only by ICANN.<sup>6</sup> A review based on this limited, one-sided, and incomplete universe of documents cannot be considered independent.

The ICANN Board was aware that the CPE Review relies on an incomplete universe of information and documents for its conclusions on 15 March 2018, when it nonetheless accepted the CPE Review. ICANN Board member Avri Doria abstained from voting on the Resolutions specifically because she believed that the CPE Review lacked procedural credibility and did not perform proper due diligence:

I am abstaining from the vote on the acceptance of the report from FTI Consulting due to the fact that while I accept the path forward as defined in the motion, I cannot accept the report itself.

From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. In scope 2, the analysis of the application of criteria, while they described a rigorous methodology, the documentation describes their inability to fully apply that methodology. The report indicates that they were not able to obtain all of the required documentation from the CPE provider necessary for the full application of the process they had defined. Any scientific method, when the method cannot be rigorously applied, the results be viewed as, at best, tentative and should be treated with caution. Though FTI Consulting reports that there is no evidence of differential application of criteria, they cannot claim with certainty that there was no differential application in the absence of full and rigorous application of their chosen methodology.

It also appears in the report that only a portion of the evaluators were interviewed. In fact, the report states that FTI consulting only interviewed two of the evaluators from a larger set of evaluators. This appears to me to be another flaw in the application of their methodology.

Any definitive determination that there was no conclusive differential application of criteria would require a further in-

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<sup>6</sup> See *id.* at pp. 3-7, 13-14.



depth study of all CPE applications and would require not only the missing documentation but also require interviewing all of the evaluators and not just the two remaining employees of the evaluation teams.<sup>7</sup>

ICANN Board Member Avri Doria's concerns regarding the CPE Review were also raised before the ICANN Board prior to 15 March 2018 by several participants in the CPE process, including Requestor.<sup>8</sup> Members of the .HOTEL contention set, represented by Flip Petillion, Crowell & Moring LLP ("Flip Petillion"), informed ICANN on 1 February 2018 that it lacked "diligence and care in the CPE process review:"

FTI recognized that it did not benefit from a complete data set, as the CPE Provider refused to give access to its email communication pertaining to the CPE process. No reason is provided as to why the CPE Provider refused access.

Remarkably, it seems that the vast majority of evaluators had left the CPE Provider before FTI started its review of the CPE process. Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process.

FTI's review of the CPE process was thus extremely limited.

Given its limited scope, no value can be attached to FTI's conclusion in the report that it found no evidence of undue influence of the ICANN organization on the CPE provider.<sup>9</sup>

Requestor further informed ICANN on 31 January 2018 that the CPE Review "is unreliable and incomplete because it was based on (1) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption

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<sup>7</sup> Exhibit 03, Avri Doria, ICANN Board Meeting Transcript (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>8</sup> See, e.g., Exhibit 04, "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (31 Jan. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>; Exhibit 05, Flip Petillion to ICANN BAMC (1 Feb. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>; Exhibit 06, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>9</sup> Exhibit 05, Flip Petillion to ICANN BAMC (1 Feb. 2018), p. 2, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>

of a flawed and inappropriate compliance-based investigative process by the FTI.”<sup>10</sup> Despite the clearly articulated and supported concerns regarding the procedural basis for the CPE Review, the ICANN Board insisted on adopting a series of resolutions that will materially affect the outcome of Requestor’s Request 16-5.

## **6.2 The CPE Review Performed No Substantive Analysis of the CPE Process.**

The CPE Review simply rubber-stamped the CPE process without any significant analysis. FTI not only performed no substantive review of the CPE process in order to reach its ultimate conclusions on these two issues but also concluded there are no issues with the CPE despite the significant evidence to the contrary.<sup>11</sup> Participants and interested parties in the CPE process have since raised concerns to ICANN about the (1) independence of the CPE Provider and (2) the discriminatory application of the CPE criteria based on their own substantive analyses.

FTI did not address any of the evidence, some of which is contained in the CPE Review, indicating that the CPE Provider lacked independence. The Independent Review Process (“IRP”) Panel in *Dot Registry v. ICANN* determined that “ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports.”<sup>12</sup> The CPE Review contains further evidence that the CPE Provider did not act independently from ICANN:

As a matter of fact, FTI’s report shows a lack of independence of the CPE provider. FTI’s Scope 1 report reveals that abundant phone calls were made between the CPE Provider and ICANN. It also mentions that ICANN advised at times that the CPE Provider’s conclusions were not supported by sufficient reasoning.

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<sup>10</sup> Exhibit 04, “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (31 Jan. 2018), p. 50, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>.

<sup>11</sup> See Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; see also Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>12</sup> Exhibit 08, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶ 93, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

ICANN was thus intimately involved in the evaluation process. The CPE Provider was anything but an independent provider. The abundant phone calls between ICANN and the CPE Provider to discuss “various issues” and ICANN’s influence on the CPE Provider’s rationale demonstrate that the CPE Provider was not free from external influence from ICANN. As a result, the CPE Provider was not independent.

FTI’s attempt to minimize ICANN’s influence on the CPE Provider is unconvincing. FTI’s report shows (i) that ICANN made extensive comments on the draft reports prepared by the CPE Provider, (ii) that those drafts were discussed at length between the CPE Provider and ICANN, and (iii) that the working of the CPE Provider and ICANN became intertwined to such extent that it became “difficult to discern which comments were made by ICANN organization versus the CPE Provider”. It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or the CPE Provider.

One can only conclude from these findings that the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue. FTI’s report confirms ICANN’s intimate involvement in the CPE and the fact that the *Despegar et al.* IRP Panel was given incomplete and misleading information.<sup>13</sup>

Therefore, FTI clearly ignored evidence and minimized significant evidence in order to conclude that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring, or conclusions reached by the CPE Provider.”<sup>14</sup>

In addition to FTI’s dismissal of all evidence concerning the CPE Provider’s lack of independence from ICANN, FTI also ignored significant evidence that the CPE Provider discriminatorily and inconsistently applied the CPE criteria. Cherine Chalaby, member of the ICANN Board, and Mark Carvell, Vice Chair of ICANN’s Governmental Advisory Committee

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<sup>13</sup> Exhibit 05, Flip Petition to ICANN BAMC (1 Feb. 2018), p. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>

<sup>14</sup> Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

(“GAC”), acknowledged the inconsistencies<sup>15</sup> and unfairness<sup>16</sup> in the CPE process. The community priority applicants, such as Requestor, have also repeatedly explained to ICANN how the CPE process is discriminatory and inconsistent.<sup>17</sup> They are supported by independent legal experts that performed substantive evaluations of the CPE. For example, Requestor submitted to ICANN an expert report by Dr. Jørgen Blomqvist, honorary professor of international copyright at the University of Copenhagen, who concluded that the EIU improperly applied the CPE criteria to community priority applicants as part of the CPE process.<sup>18</sup> The expert opinion by Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, further supports Dr. Blomqvist’s conclusions; he found that the CPE Review (1) shows an “incomplete understanding” of the CPE’s criteria,<sup>19</sup> (2) contained “interpretive errors,” and (3) contained “errors of inconsistency and discrimination.”<sup>20</sup> These expert opinions were affirmed by the Council of Europe, a leading human rights organization with an observer status within the GAC that issued a report substantively analyzing the CPEs and concluding that the CPE Provider

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<sup>15</sup> Exhibit 09, ICANN, Transcript of Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, [https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2) (“I personally would comment that I have observed inconsistencies applying the (AGB) scoring criteria for (CPE)’s and ... there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases.”).

<sup>16</sup> *Id.* at p. 12 (“The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. That was not happening.”).

<sup>17</sup> See Exhibit 10, Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (15 Dec. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>; see also Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), pp. 20-24, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>18</sup> See Exhibit 12, Expert Legal Opinion by Honorary Professor in International Copyright Dr. Jørgen Blomqvist (17 June 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>.

<sup>19</sup> Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 74, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>20</sup> *Id.* at pp. 20-21.

inconsistently applied the CPE criteria.<sup>21</sup> FTI did not address any of the aforementioned evidence in the CPE Review even though they all directly contradict its conclusions on the CPE process.<sup>22</sup>

Rather, the CPE Review simply concluded that “the CPE Provider consistently applied the CPE criteria throughout all [CPEs]”<sup>23</sup> without adequately addressing any of the concerns from community priority applicants, legal experts, and ICANN members. Not once in the CPE Review did FTI directly address the concerns, evidence, and conclusions put forth by any of the community priority applicants and the Council of Europe. FTI simply defended the CPE process without performing any substantive analysis. As explained by Flip Petillion,

The second part of FTI’s report (Scope 2) was supposed to focus on the consistency – or better, lack of consistency – of CPE decisions.

However, FTI’s [*sic*] did not analyse the consistency issues during CPE. The report simply sums up the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria. FTI did not examine the consistency between the reasons invoked by the CPE Provider. It also failed to examine whether the CPE provider was consistent in applying those reasons to the different applications. There is no analysis whatsoever as to the inconsistencies invoked by applicants in RfRs, IRPs or other processes.

Emblematic of the lack of analysis is the fact that FTI did not examine the gTLD applications underlying the CPE report. These gTLD applications are not even mentioned among the materials reviewed by FTI. Without reviewing the underlying applications, it is impossible to assess the consistent application of policies and standards. ...

The fact that those inconsistencies were left unaddressed by FTI is inexcusable. Requesters described the inconsistencies clearly and repeatedly. The *Despegar et al.* IRP Panel considered Requesters’

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<sup>21</sup> Exhibit 13, Eve Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 41-57, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>22</sup> *Id.* at p. 3.

<sup>23</sup> Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 57, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

description of those inconsistencies to have merit. The existence of said inconsistencies has never been contested. And FTI's report simply ignores them.<sup>24</sup>

Clearly, FTI's approach to the CPE Review was to simply describe the CPEs rather than evaluate their substance to determine whether the CPE Provider was actually adhering to the applicable guidelines. And, yet, the ICANN Board accepted FTI's conclusions by adopting the Resolutions and the BAMC will now apply the flawed determinations in the CPE Review to Requestor's Request 16-5—materially affecting the treatment of Requestor's community priority application.

### **6.3 ICANN Adopted the Resolutions in Violation of Its Bylaws.**

In adopting the Resolutions, the ICANN Board violated its own Bylaws. It specifically breached the ICANN Bylaws requiring that the ICANN Board (1) comply with international law and conventions in an open and transparent process; (2) adhere to its Commitments and Core Values; and (3) employ procedures designed to ensure fairness and fact-based development.

*First*, ICANN has not complied with international law and conventions. ICANN is required to “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>25</sup> There is an “an international minimum standard of due process as fairness – based ... on the universal views of all legal systems.”<sup>26</sup> This principle is violated “when a decision is based upon evidence

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<sup>24</sup> Exhibit 05, Flip Petition to ICANN BAMC (1 Feb. 2018), p. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>

<sup>25</sup> Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>26</sup> Exhibit 15, Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law” 23 *Duke J. of Comparative and Int'l L.* 411, 422 (2013).

and argumentation that a party has been unable to address.”<sup>27</sup> The BAMC and ICANN Board have both made a decision based on the CPE Review.<sup>28</sup> While Requestor has submitted numerous materials regarding the CPE Review to the ICANN Board, such as the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,”<sup>29</sup> it has been unable to address the evidence supporting the CPE Review because they have not been made publically available.

In fact, ICANN has prevented any attempts by Requestor, and other interested parties, to obtain and review the underlying substance of the CPE Review. On 10 January 2018, Requestor sought disclosure of documentary information relating to the CPE Review (the “DIDP Request”) pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).<sup>30</sup> ICANN refused to disclose any of the requested documents.<sup>31</sup> ICANN thus prevented Requestor from examining the evidence supporting the CPE Review in order to analyze the review’s results in violation of ICANN’s own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness. It is patently unfair to require a party to address criticisms of its conduct without providing that party with relevant and material information that would allow it to properly address those criticisms. ICANN’s stonewalling effectively puts in Requestor in a position that makes it virtually impossible for it to provide a detailed analysis of

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<sup>27</sup> Exhibit 16, Charles T. Kotuby and Luke A. Sobota, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 179 (15 Mar. 2017).

<sup>28</sup> Exhibit 17, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (4 Feb. 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. ... While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

<sup>29</sup> Exhibit 04, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (2 Feb. 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>30</sup> Exhibit 18, Request No. 20180110-1 (10 Jan. 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>. Requestor submitted 19 requests.

<sup>31</sup> See Exhibit 19, Response to Request No. 20180110-1 (10 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>. ICANN argued that it appropriately determined that “certain documents are not appropriate for disclosure” pursuant to its Nondisclosure Conditions, and it can therefore deny the document request “without contravening its commitment to transparency.” *Id.* at p. 8. Although ICANN can still disclose documents covered by its Nondisclosure Conditions in the public interest, ICANN did not find that there was sufficient public interest to warrant disclosure.

the CPE Review’s deficiencies. Even so, the deficiencies that have been identified in the absence of the requested information are not only sufficient to justify ICANN’s rejection of the CPE Review, they undeniably support disclosure of the additional information that has been requested.

*Second*, the ICANN Board did not adhere to its Commitments and Core Values. Pursuant to its Bylaws, the ICANN Board must “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”<sup>32</sup> ICANN’s adoption of the Resolutions breached four specific Commitments and Core Values:

1. The ICANN Board violated its Commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act” because it did not act for the public benefit by accepting the conclusions of reports that rubber-stamp an evaluation process for community applicants that legal experts, human rights organizations, and ICANN itself has recognized as problematic.
2. The ICANN Board violated its Commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] promote well-informed decisions based on expert advice.”<sup>33</sup> The ICANN Board is aware of *several* independent experts that concluded the CPE Review was procedurally and substantively deficient, as described in **Sections 6.1 and 6.2** above. Yet, it still supported the conclusions of *one* evaluator that employed a blatantly flawed review methodology and ignored all evidence contrary to its own conclusions.
3. The ICANN Board violated its Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.”<sup>34</sup> Any neutral, objective, and fair examination of the CPE Review would

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<sup>32</sup> Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2, <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>33</sup> *Id.* at Article 3, Section, 3.1.

<sup>34</sup> *Id.* at Article 1, Section, 1.2(a)(v).



conclude that it is deficient, as explained in Requestor’s past submissions to the ICANN Board.<sup>35</sup> The ICANN Board thus made a decision in contravention of the aforementioned principles adopting the CPE Review.

4. The ICANN Board violated its Core Value to “[o]perat[e] with efficiency and excellence.”<sup>36</sup> It is evident that the knowing acceptance of a deficient independent evaluation does not constitute operating with any degree of excellence.

And, *third*, the ICANN Board violated the Bylaws requiring that it act “consistent with procedure designed to ensure fairness, including implementing procedures to ... encourage fact-based policy development work”<sup>37</sup> The CPE Review is based on an incomplete and unreliable universe of documents biased in favor of ICANN, as explained in **Section 6.1** above. The ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness, part of which requires ICANN to encourage fact-based work. The ICANN Board’s decision to adopt the Resolutions, therefore, violates ICANN’s Bylaws because it knowingly adopted the flawed CPE Review with utter disregard for basic notions of due process and fair play.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s actions materially affect the global music community that has supported the Requestor’s application. Accepting the flawed and incomplete findings of the CPE Review has negatively impacted the timely, predictable, and fair resolution of the .MUSIC gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without

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<sup>35</sup> See Exhibit 04, “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (31 Jan. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>;

<sup>36</sup> Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2(b)(v), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>37</sup> *Id.* at Article 1, Section. 1.2(a)(iv).

an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake because an ICANN that lacks these principles undermines its own due diligence and decision-making process in matters that relate to the global public interest and in its determinations that materially affected parties.

By accepting the findings of the CPE Review as final, ICANN is impeding the efforts of anyone attempting to understand the process FTI used to review the CPE process and compromises ICANN's own due diligence process, especially when taking into consideration the issues relevant to the CPE Provider's improper application of CPE criteria as described in Requestor's submissions.<sup>38</sup> This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming IRP and/or legal action to safeguard the interests of the music community members, which have supported Requestor's application for .MUSIC, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

The Requestor filed a community priority application for the .MUSIC gTLD. However, the CPE Provider recommended that ICANN reject the Requestor's community application.<sup>39</sup> Requestor subsequently made various submissions, including independent expert reports supporting its community application, showing that the CPE Provider's decision is fundamentally erroneous.<sup>40</sup> These submissions explain how the CPE Provider disparately treated Requestor's application by misapplying the CPE criteria, applying the CPE criteria differently than in other

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<sup>38</sup> Exhibit 20, DotMusic's Presentation to the Board Governance Committee (17 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

<sup>39</sup> Exhibit 21, DotMusic Limited CPE Report (10 Feb. 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>40</sup> Exhibit 22, "Request 16-5: DotMusic Limited" ICANN (last visited 13 Apr. 2018), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

gTLD community applications, failing to follow its own guidelines, discriminatorily treating the application, making several factual errors, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria.

ICANN began its own review of the CPE process in late 2016.<sup>41</sup> The ICANN Board “direct[ed] [its] President and CEO, or his designee(s), to undertake an independent review” of the CPE process.<sup>42</sup> ICANN did not disclose any substantive information about this review to the Requestor or other participants in the CPE process. However, since the review concerns an examination of the CPE process, it was apparent to Requestor early on that the review will directly affect the outcome of Request 16-5. Thus, on 5 May 2017, Requestor filed a DIDP request seeking various categories of documents concerning the Board Governance Committee’s (“BGC”) review of the CPE process (the “First DIDP Request”) in an attempt to learn more about the review.<sup>43</sup> ICANN did not disclose the substantive information requested in the First DIDP Request.<sup>44</sup>

After Requestor submitted its First DIDP Request, ICANN finally disclosed additional information regarding the CPE review. On 2 June 2017, ICANN announced that FTI was reviewing the CPE process, and collecting information and materials from ICANN and the CPE Provider regarding the process.<sup>45</sup> In response, on 25 July 2017, the Requestor jointly filed another DIDP Request with dotgay LLC, another community priority applicant, on 10 June 2017 (the

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<sup>41</sup> Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (26 Apr. 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>42</sup> Exhibit 24, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>43</sup> Exhibit 25, Request 20170505-1 (5 May 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>44</sup> Exhibit 26, Response to Request 20170505-1 (4 June 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process (“CEP”) with ICANN.

<sup>45</sup> Exhibit 27, Community Priority Evaluation Process Review Update (2 Jun. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

“Second DIDP Request”) to learn about FTI and the purview of its review.<sup>46</sup> This request was also denied in violation of ICANN’s commitment to transparency.<sup>47</sup>

Requestor finally learned substantive information about FTI’s review on 13 December 2017, when ICANN decided to publish the results of FTI’s work.<sup>48</sup> Upon review of FTI’s three reports, Requestor found that they contained significant problems both in the substance of the reports and the procedures that FTI used to in its review.<sup>49</sup> For instance, FTI did not re-evaluate the CPE applications, examine the substance of the reference material cited in its own reports, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants. As FTI’s review is intended to “assist in the CPE review,”<sup>50</sup> Requestor sought to learn about FTI and its flawed reports on the CPE process, which makes several conclusions that may significantly impact Request 16-5.<sup>51</sup> Therefore, Requestor submitted to ICANN the DIDP Request in order to obtain documents regarding the underlying substance of the CPE Review.<sup>52</sup> ICANN again refused to disclose any of the requested documents.<sup>53</sup>

Rather than provide Requestor with any substantive information regarding the CPE Review, and therefore permit a substantive analysis of FTI’s conclusions, the ICANN Board

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<sup>46</sup> Exhibit 28, Request 20170610-1 (10 Jun. 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>47</sup> Exhibit 29, Response to Request 2-170610-1 (10 July 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>. Requestor began the reconsideration request process in response to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the CEP with ICANN.

<sup>48</sup> Exhibit 30, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>49</sup> See Exhibit 04, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>50</sup> Exhibit 27, Community Priority Evaluation Process Review Update (2 Jun. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>51</sup> Exhibit 18, Request No. 20180110-1 (10 Jan. 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> See Exhibit 19, Response to Request No. 20180110-1 (10 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

instead proceeded to adopt the procedurally and substantively deficient CPE Review—as described in **Section 6** above—on 15 March 2018.

## 9. What are you asking ICANN to do now?

Requestor asks ICANN to reconsider its 15 March 2018 action and reject both the Resolutions and the findings of the CPE Review. This is based on a plethora of factors, including

- (1) the lack of independence of the CPE Review, e.g. neglecting to interview any affected parties, such as DotMusic;
- (2) the DIDP requests filed by DotMusic and rejected by ICANN that would have enabled ICANN to be transparent and accountable, and make a reasonable, unbiased and compelling decision concerning the CPE Review;
- (3) the weakness of the research undertaken by the CPE Provider throughout the CPE process, e.g. the over-reliance on untrustworthy sources like Wikipedia;
- (4) the findings of the Council of Europe that the CPE process was flawed and inconsistent;
- (5) the findings of numerous experts that concluded that DotMusic was improperly and inconsistently graded in its CPE;
- (6) the findings of experts concerning evaluations of other community applicants that concluded that they were improperly and inconsistently graded in their CPE;
- (7) the findings of the *Dot Registry* IRP, which concluded ICANN staff were intimately involved in the CPE process in violation of its Bylaws;
- (8) the findings of the *Despegar* IRP, which concluded that the claim of inconsistencies between CPEs had some merit;<sup>54</sup>
- (9) the scope of the CPE Review that did not include a substantive review of the CPE process, including looking into the appearance of conflicts of interest;

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<sup>54</sup> Exhibit 31, *Despegar Online SRL et al. v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration (12 Feb. 2016), ¶ 146, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

(10) FTI's admission that it was unable to fully apply their methodology because it was unable to obtain all of the required documentation from the CPE Provider necessary for the full application of the process they had defined;

(11) the lack of claim by FTI that there was no procedural improprieties given the absence of a full and rigorous application of their chosen methodology, especially since only two of the CPE Provider's staff were interviewed.<sup>55</sup>

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, Requestor is a community applicant for the .MUSIC gTLD that participated in the CPE process. Requestor's Request 16-5 contests the results of the CPE for .MUSIC and is currently before the BAMC. However, the CPE Review claims that there are no problems with the CPE process. The ICANN Board has decided to accept the CPE Review through the Resolutions and conclude its investigation of the CPE process despite being aware of the significant procedural and substantive problems with the CPE Review. Its acceptance of the flawed CPE Review will directly affect the BAMC's consideration of Request 16-5 and, therefore, Requestor and the community that Requestor seeks to support through the operation of .MUSIC as a community gTLD—the global music community.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, the Reconsideration Request is filed on behalf of DotMusic Limited.

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<sup>55</sup> See Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 9-10, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

Not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



Arif Hyder Ali

April 14, 2018

Date

**Subject:** Re: [Reconsideration Request] Reconsideration Requests 18-5  
**Date:** Monday, May 21, 2018 at 1:36:01 PM Pacific Daylight Time  
**From:** Herb Wayne (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman

Reconsideration Request 18-5

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-5.

Best regards,

Herb Wayne  
ICANN Ombudsman

<https://www.icann.org/ombudsman> [icann.org]

<https://www.facebook.com/ICANNombudsman> [facebook.com]

Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf> [icann.org]

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en> [icann.org]

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Saturday, May 19, 2018 at 7:20 PM  
**To:** ombudsman <ombudsman@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Requests 18-4, 18-5, and 18-6

Dear Herb,

On 13 and 14 April 2018, the following Reconsideration Requests were submitted seeking reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11, which resolved the Community Priority Evaluation (CPE) Process Review:

- Request 18-4 filed by dotgay LLC
- Request 18-5 filed by DotMusic Limited
- Request 18-6 filed by Travel Reservations SRL, Minds + Machines Group Limited,



Radix FZC, dot Hotel Inc., Registry LLC

The Requests have been published on the Reconsideration page and are also attached.

The Board Accountability Mechanisms Committee (BAMC) has determined that Requests 18-4, 18-5, and 18-6 are sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#), and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Requests 18-4, 18-5, and 18-6 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Requests 18-4, 18-5, and 18-6 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of the Requests.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-5  
14 JUNE 2018**

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The Requestor, DotMusic Limited, seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.<sup>1</sup> Specifically, the Requestor claims that, “(1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s Bylaws.”<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for the .MUSIC generic top-level domain (gTLD) (Application or DotMusic Application), which was placed in a contention set with other .MUSIC applications. The Requestor participated in CPE, but did not prevail. The Requestor challenged the CPE Provider’s evaluation of its Application in Reconsideration Request 16-5, which is pending.<sup>3</sup>

While Request 16-5 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>4</sup> The Board Governance Committee (BGC) thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) a compilation of the research relied

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<sup>1</sup> Request 18-5, § 3, at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

<sup>2</sup> *Id.*, § 6, at Pg. 3.

<sup>3</sup> See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

<sup>4</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.<sup>5</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-5, would be placed on hold until the CPE Process Review was completed.<sup>6</sup>

On 13 December 2017, ICANN organization published three reports on the CPE Process Review (CPE Process Review Reports).<sup>7</sup>

On 15 March 2018, the Board passed the Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>8</sup>

On 14 April 2018, the Requestor submitted Request 18-5, which challenges the Resolutions.<sup>9</sup> The Requestor claims that “ (1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s Bylaws.”<sup>10</sup>

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<sup>5</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>6</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, *see* <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

<sup>7</sup> *See* <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>8</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>9</sup> Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

<sup>10</sup> Request 18-5, § 6, at Pg. 3.

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-5 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>11</sup>

The BAMC has considered Request 18-5 and all relevant materials and recommends that the Board deny Request 18-5 because the Board considered all material information when it adopted the Resolutions, which are consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.<sup>12</sup> The CPE Process Review Reports identify the materials considered by FTI.<sup>13</sup> Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.<sup>14</sup>

## **II. Facts.**

### **A. The CPE Provider's Evaluation of .MUSIC.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited and the Requestor accepted to participate in CPE.<sup>15</sup>

On 10 February 2016, the CPE panel issued a CPE report, concluding that the Application did not prevail in CPE.<sup>16</sup> On 24 February 2016, the Requestor filed Request 16-5,

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<sup>11</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-5, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-ombudsman-action-21may18-en.pdf>.

<sup>12</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>13</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>14</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>15</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>16</sup> *Id.*; *see also* CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

seeking reconsideration of the CPE determination and approval of the Requestor's community application.<sup>17</sup>

**B. The CPE Process Review.**

While Request 16-5 was still pending, ICANN's Board, as part of the Board's oversight of the New gTLD Program, directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).<sup>18</sup>

Subsequently, the BGC determined that, in addition to Scope 1, the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research existed for evaluations that were the subject of pending reconsideration requests (Scope 3).<sup>19</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-5, would be on hold until the CPE Process Review was completed.<sup>20</sup>

On 13 December 2017, ICANN org published CPE Process Review Reports issued by FTI.<sup>21</sup>

With respect to Scope 1, FTI concluded:

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<sup>17</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>18</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>19</sup> *Id.*

<sup>20</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>21</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.<sup>22</sup>

For Scope 2, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”<sup>23</sup>

For Scope 3, “FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider’s working papers to the extent that such material was not otherwise cited in the final CPE report.”<sup>24</sup> FTI observed that all eight of the relevant CPE reports (the reports at issue in the Reconsideration Requests that were placed on hold) referenced research. Two of the eight included citations for each reference to research. Of the remaining six, while the reports themselves did not include citations to each reference to research, in five of the six instances, including in the Requestor’s case, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports.<sup>25</sup> Accordingly, FTI determined that it was “reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.”<sup>26</sup>

On 15 March 2018, as detailed above, the Board adopted the Resolutions.<sup>27</sup> The Board

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<sup>22</sup> Scope 1 Report, at Pg. 2, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>23</sup> Scope 2 Report, at Pg. 3, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>24</sup> Scope 3 Report, at Pg. 3-4, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>25</sup> *Id.*, at Pg. 4, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>26</sup> *Id.* at Pg. 42-44.

<sup>27</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>. One Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions.” San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>. Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting. *Id.*

instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),<sup>28</sup> and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).<sup>29</sup> The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.<sup>30</sup>

The Board noted that the requestors with pending reconsideration requests

each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.<sup>31</sup>

### **C. The Requestor's Response to the CPE Process Review.**

On 16 January 2018, the Requestor submitted a letter to the Board, claiming that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.<sup>32</sup> In this letter, the Requestor asked the Board to take no action with respect to the conclusions

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<sup>28</sup> <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

<sup>29</sup> Resolutions. *See also* Roadmap, <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

<sup>30</sup> Roadmap, at Pg. 2.

<sup>31</sup> *Id.*

<sup>32</sup> 16 January Letter from Ali to ICANN Board, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

reached by FTI until parties had an opportunity to respond to the FTI Report and to be heard as it relates to their pending reconsideration requests.<sup>33</sup>

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Requestor to “submit additional information relating to Request 16-5, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the Requestor to “make a telephonic oral presentation to the BAMC in support of” Request 16-5. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-5 and that is not already covered by the written materials.”<sup>34</sup>

On 23 March 2018 and 5 April 2018, the Requestor “reject[ed] BAMC’s invitation to make a telephonic presentation limited to 30 minutes” and “reject[ed] ICANN’s attempt to impose an artificial two weeks deadline” for supplemental briefing.<sup>35</sup>

#### **D. Request 18-5.**

On 14 April 2018, the Requestor submitted Request 18-5, which challenges the Resolutions.<sup>36</sup> The Requestor claims that “(1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s bylaws.”<sup>37</sup>

#### **E. Relief Requested.**

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<sup>33</sup> *Id.* at Pg. 5.

<sup>34</sup> Attachment 1, 19 March 2018 Email from ICANN to the Requestor.

<sup>35</sup> 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5

<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>; Attachment 2, 5 April 2018 Email from the Requestor to ICANN.

<sup>36</sup> Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

<sup>37</sup> *Id.*, § 6, at Pg. 3.



The Requestor asks the Board to “reconsider its 15 March 2018 action and reject both the Resolutions and the findings of the CPE Review.”<sup>38</sup>

### **III. Issue Presented.**

The issue is whether the Board’s adoption of the Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).

### **IV. The Relevant Standards for Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.<sup>39</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>40</sup> Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>41</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

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<sup>38</sup> *Id.*, § 9, at Pg. 17.

<sup>39</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>40</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>41</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>42</sup>

On 19 May 2018, the BAMC determined that Request 18-5 is sufficiently stated and sent Request 18-5 to the Ombudsman for review and consideration.<sup>43</sup> The Ombudsman thereafter recused himself from this matter.<sup>44</sup> Accordingly, the BAMC has reviewed Request 18-5 and issues this Recommendation.

## **V. Analysis and Rationale.**

### **A. The Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).**

The Requestor’s claims focus on the transparency, fairness, efficiency, methodology, and scope of the CPE Process Review. But, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

#### **1. The Requestor’s Challenges to FTI’s Methodology Do Not Warrant Reconsideration.**

The Requestor claims that FTI’s methodology was flawed because: (1) the CPE Provider did not produce documents in the course of the investigation; (2) FTI did not interview any

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<sup>42</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>43</sup> Ombudsman Action Regarding Request 18-5, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-ombudsman-action-21may18-en.pdf>.

<sup>44</sup> *Id.*

former employees of the CPE Provider; and (3) FTI did not interview CPE applicants or accept materials from them in the course of its investigation.<sup>45</sup>

As a preliminary matter, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.<sup>46</sup> The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and it relied on FTI to develop an appropriate methodology.<sup>47</sup> The Requestor has identified no policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

Moreover, with respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.<sup>48</sup> FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the CPE process and evaluations.<sup>49</sup> Accordingly, it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider.

As noted in the CPE Process Review Reports, FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming

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<sup>45</sup> Request 18-5, § 6, at Pg. 3. *See also, e.g.*, 23 March 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf> (FTI did not interview applicants); 16 January Letter from Ali to ICANN Board, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf> (alleging that FTI “deliberately ignored the information and materials provided by the applicants”).

<sup>46</sup> *See, e.g.*, Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>47</sup> *See* CPE Process Review Update, 2 June 2017, <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>48</sup> *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>49</sup> *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and that internal and external emails were not “working papers.”<sup>50</sup> No policy or procedure exists that would require ICANN org to cancel the entire CPE Process Review because the CPE Provider did not produce its internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process Review.<sup>51</sup> Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.<sup>52</sup> Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has identified no policy or procedure requiring FTI to do more because none exists. Reconsideration is not warranted on this ground.

With respect to the argument that FTI did not interview CPE applicants or accept materials from the applicants in the course of the review, the Requestor has not identified a policy or procedure requiring FTI to do so. While the Requestor may disagree with FTI’s methodology, such disagreement is not sufficient grounds for reconsideration.

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<sup>50</sup> See Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>. See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services 12 Mar 2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>51</sup> Scope 2 Report at Pg. 9.

<sup>52</sup> Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

Indeed, FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the investigation.<sup>53</sup> FTI noted that neither the Applicant Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Applicant Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants. Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.<sup>54</sup> Despite that conclusion, FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.<sup>55</sup>

The comments of one Board member about FTI’s methodology also do not support reconsideration. That Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions,”<sup>56</sup> does not render the vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting.<sup>57</sup> Likewise, that the Requestor and other parties disappointed in the outcome of CPE determinations raised similar criticisms of the CPE Review process in no way precludes the ICANN Board from accepting the results of that review.<sup>58</sup>

2. FTI Was Not Required to Agree with Others’ Substantive Conclusions and Did Not Fail to Engage in “Substantive Analysis.”

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<sup>53</sup> *Id.* at Pg. 8.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>57</sup> *Id.*

<sup>58</sup> *See* Request 18-5, § 6, at Pg. 7-8.

In its second argument, the Requestor contends that reconsideration is warranted because, according to the Requestor, “FTI not only performed no substantive review of the CPE process in order to reach its ultimate conclusions on [Scope 1 and Scope 2] but also concluded there are no issues with the CPE despite the significant evidence to the contrary.”<sup>59</sup> The Requestor’s suggestion that reconsideration is warranted because FTI’s conclusions differed from other opinions claiming that the CPE process is inconsistent.<sup>60</sup> The Association of Certified Fraud Examiners (ACFE), the anti-fraud organization that has codified the international investigative methodology that FTI followed, required that FTI form an investigative plan, collect all potentially relevant evidence and information, then analyze the relevant evidence and arrive at their conclusion based on that evidence<sup>61</sup>—not based on the opinions or investigations of prior investigators or commentators. Consistent with this methodology, FTI “carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE,” including specifically allegations that “ICANN organization had any undue influence on the CPE provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process”<sup>62</sup> and that the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”<sup>63</sup>

Similarly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review. Rather, the review was “intended to have a positive impact on the community” and “provide greater transparency into the CPE evaluation process.”<sup>64</sup> This decision was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the

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<sup>59</sup> Request 18-5, § 6, at Pg. 6.

<sup>60</sup> See Request 18-5, § 6, at Pg. 6-10.

<sup>61</sup> See Scope 1 Report at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>62</sup> Scope 1 Report, at Pg. 3.

<sup>63</sup> Scope 2 Report, at Pg. 3.

<sup>64</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

process had flaws or could otherwise be improved. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. The Requestor's arguments do not support reconsideration.

Specifically, the Requestor first notes the observation in the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC (Dot Registry IRP) that "ICANN staff was intimately involved in the [CPE] process" and "supplied continuing and important input on the CPE Reports."<sup>65</sup> But there are good reasons for FTI to have reached different conclusions than the Dot Registry IRP Panel. That Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be "intimately involved in the [CPE] process." At the same time, the Panel emphasized that the Panel was "not assessing whether ICANN staff or the [CPE Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook]." In response, the Board undertook serious consideration of the Panel's comments concerning how ICANN staff members interacted with the CPE provider and the CPE reports, and directed ICANN organization to undertake the CPE Process Review. Based on the *evidence* in a different record, FTI concluded that there was "no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process."<sup>66</sup>

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<sup>65</sup> Request 18-5, § 6, at Pg. 6 (quoting Exhibit 08, Dot Registry v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶ 93, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>).

<sup>66</sup> Scope 1 Report, at Pg. 3.

Nor, contrary to Requestor’s claims, does the “CPE Review contain[] further evidence that the CPE Provider did not act independently from ICANN.”<sup>67</sup> After reviewing emails between ICANN organization and the CPE Provider, FTI concluded that the “vast majority” were “administrative in nature,” and that even those that “discussed the substance of the CPE Process and specific evaluations” centered on attempts to “capture the CPE Provider’s reasoning.”<sup>68</sup> In reviewing the emails, “FTI observed no instances where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached.”<sup>69</sup> And its interviews of ICANN org and CPE Provider personnel further confirmed that “ICANN organization never questioned or sought to alter the CPE Provider’s conclusions,” that the CPE Provider “never changed the scoring or the results based on ICANN organization’s comments,” and that “ICANN organization did not impact the CPE Provider’s scoring decisions.”<sup>70</sup>

Similarly, the Requestor’s complaints regarding the Scope 2 Report’s conclusion that “the CPE Provider consistently applied the CPE criteria” is unfounded.<sup>71</sup> The Requestor claims that statements from certain third parties and the Council of Europe (in its 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (CoE Report))<sup>72</sup> are inconsistent with and not addressed by FTI in the CPE Process Review Reports. But again, the fact that others reached different conclusions than FTI does not invalidate FTI’s Reports, nor

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<sup>67</sup> Request 18-5, § 6, at Pg. 6.

<sup>68</sup> Scope 1 Report, at Pg. 11.

<sup>69</sup> Scope 1 Report, at Pg. 11-12.

<sup>70</sup> Scope 1 Report, at Pg. 14-15.

<sup>71</sup> See Scope 2 Report, at Pg. 57.

<sup>72</sup> Request 18-5, § 6, at Pg. 8.



does it warrant reconsideration of the Board’s action in adopting the Resolutions.<sup>73</sup> Contrary to the Requestor’s suggestion, FTI did not fail to address evidence of inconsistency. Rather, it “carefully considered the claims raised in Reconsideration Requests and IRP proceedings related to CPE,” and “specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports.”<sup>74</sup>

Finally, the Requestor alleges that “FTI simply defended the CPE process without performing substantive analysis,”<sup>75</sup> and it cites a submission by another applicant dissatisfied with the results of the CPE Process that criticizes FTI for not examining the underlying CPE applications.<sup>76</sup> These complaints provide no basis for reconsideration. To be sure, FTI did not conduct a *de novo* redetermination of the scores awarded to each applicant. That was not within the scope of the CPE Process Review, and it would have been improper for FTI to do so. Instead, FTI “examined all aspects of the CPE Provider’s evaluation process in evaluating whether the CPE Provider consistently applied the CPE criteria throughout each CPE.”<sup>77</sup> The methodical nine-step process FTI laid out and followed cannot plausibly be described as lacking “substantive analysis.” Accordingly, reconsideration is not warranted.

### 3. The ICANN Board’s Adoption of the Resolutions Complied with the ICANN Bylaws.

Finally, the Requestor contends that the adoption of the Resolutions violated ICANN organization’s Bylaws in three ways: (1) that the Board’s action violated international law and conventions with which the Bylaws require compliance; (2) that the Board’s action violated the

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<sup>73</sup> This is equally true of the reports of Dr. Blomqvist and Professor Eskridge that Requestor cites for their disagreement with the CPE Review’s conclusion. See Request 18-5, § 6, at Pg. 8.

<sup>74</sup> Scope 2 Report, at Pg. 3.

<sup>75</sup> Request 18-5, § 6, at Pg. 10.

<sup>76</sup> Request 18-5, § 6, at Pg. 9-10 (citing Letter from Flip Petillion to ICANN BMAC (1 Feb. 2018), at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>).

<sup>77</sup> Scope 2 Report, at Pg. 8.

Commitments and Core Values set out in the Bylaws; and (3) that the Board’s action violated the Bylaws’ requirement of fairness. As discussed below, none of these arguments warrant reconsideration.

First, as to the claim that the Board’s action purportedly violated international law and conventions, the Requestor asserts that “[t]here is an ‘international minimum standard of due process as fairness—based . . . on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.’”<sup>78</sup> The Requestor argues that the CPE Process Review did not provide due process to the Requestor because “it has been unable to address the evidence supporting the CPE Review because they [sic] have not been made publically available.”<sup>79</sup>

The Bylaws provide that ICANN org is committed to “carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.”<sup>80</sup> The Requestor has not demonstrated how the Board’s action in adopting the Resolutions violates this commitment. Rather, the Requestor is attempting to reassert the claims it presented in Request 18-1, challenging ICANN organization’s response to its 2018 DIDP Request seeking documents related to the CPE Process Review. However, for the reasons set forth in the BAMC’s Recommendation of Request 18-1, which are incorporated herein by reference, ICANN org’s response to the Requestor’s 2018 DIDP request did not violate any relevant international law or convention; while the Requestor has a right to full consideration of

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<sup>78</sup> Request 18-5, § 6, at Pg. 10-11 (quoting Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law,” 23 *Duke J. of Comparative & Int’l L.* 411, 422 (2013) and Charles T. Kotuby & Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 179 (Mar. 15, 2017)) (alteration in original).

<sup>79</sup> *Id.*, § 6, at Pg. 11.

<sup>80</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

its position, which the BAMC is committed to giving, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP<sup>81</sup>

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its oversight of the New gTLD Program, after considering all the relevant issues.<sup>82</sup> As noted by the Panel in the *Booking v. ICANN* IRP Final Declaration, “the fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.<sup>83</sup> Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone set a particularly wide or narrow scope for it or for the disclosure of supporting materials to the Requestor. The Requestor’s conclusory statement that it has been deprived due process because it did not have access to every document underlying the CPE Process Review Reports<sup>84</sup> does not support reconsideration.

With respect to the Requestor’s second claim that the Board purportedly violated its Commitments and Core Values set out in the Bylaws, the Requestor bases its claim on its earlier criticisms of the CPE Process Review, which does not warrant reconsideration for many of the reasons outlined above. For example, it alleges that the Core Value of “[o]perating with efficiency and excellence” was breached by the “knowing acceptance of a deficient independent evaluation.”<sup>85</sup> The BAMC finds no support for the Requestor’s claims that the evaluation was

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<sup>81</sup> Recommendation of the BAMC on Request 18-1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

<sup>82</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>83</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, *available at* <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

<sup>84</sup> Request 18-5, § 6, p. 11-12.

<sup>85</sup> Request 18-5, § 6, p. 13; *see* ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(b)(v).

“deficient,” let alone that ICANN org accepted it despite “knowing” it was so, and therefore, these arguments provide no basis for reconsideration.

Third, regarding the Requestor’s claims that the adoption of the Resolutions violated the Bylaws’ requirement that ICANN organization act “consistent with procedure[s] designed to ensure fairness, including implementing procedures to . . . encourage fact-based policy development work,”<sup>86</sup> because, according to Requestor, “[t]he CPE Review is based on an incomplete and unreliable universe of documents biased in favor of ICANN.”<sup>87</sup> But as described above, FTI’s choice of investigative methodology provides no reason for reconsideration, and it likewise does not when made again through the lens of this particular Bylaws provision.

4. The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-5.

The Requestor claims that it is “materially affected by the Resolutions, which accept the findings of the CPE Review, because the BAMC intends to rely on the CPE Review to decide Requestor’s Reconsideration Request 16-5.”<sup>88</sup> When the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>89</sup> The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-5 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-5), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-5. The BAMC notes that it provided

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<sup>86</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

<sup>87</sup> Request 18-5, § 6, at Pg. 13.

<sup>88</sup> Request 18-5, § 6, at Pg. 3.

<sup>89</sup> See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

the Requestor an opportunity to “be heard” and to “respond to the FTI Report,”<sup>90</sup> but the Requestor declined the opportunity when it was offered to it in March and April 2018.<sup>91</sup>

## **VI. Recommendation.**

The BAMC has considered the merits of Request 18-5 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments, and Core Values when it passed the Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-5.

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<sup>90</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

<sup>91</sup> 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5  
<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>; Attachment 2, 5 April 2018 Email from the Requestor to ICANN.

ATTACHMENT 1 TO BAMC RECOMMENDATION

**Subject:** [Reconsideration Request] Update on Reconsideration Request 16-5  
**Date:** Monday, March 19, 2018 at 1:37:51 PM Pacific Daylight Time  
**From:** Reconsideration (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Constantine Roussos, Contact Information Redacted  
**CC:** Reconsideration  
**Attachments:** ATT00001.txt

Dear Messrs. Roussos and Ali,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[icann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[icann.org\]](#) for the review the requests. In accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to submit additional information relating to Request 16-5, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-5 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30-minute telephonic presentation in March and April with your response.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

ATTACHMENT 2 TO BAMC RECOMMENDATION



**Subject:** Re: [Reconsideration Request] Update on Reconsideration Request 16-5  
**Date:** Thursday, April 5, 2018 at 1:07:05 PM Pacific Daylight Time  
**From:** Wong, Rosey (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** reconsideration@icann.org  
**CC:** Jason Schaeffer, Paul Zamek, ALL DOT Music, Constantine Roussos  
**Attachments:** ATT00001.txt

Dear ICANN:

We write in response to your April 4, 2018 email on behalf of our client, DotMusic Limited ("DotMusic"). The email requests that DotMusic respond to several invitations from the BAMC regarding Reconsideration Request 16-5, specifically whether (1) DotMusic would like to make an additional submission to the BAMC, (2) DotMusic's 2 February 2018 report is its supplemental submission to the BAMC, and (3) DotMusic wants to make a 30 minute telephonic presentation to the BAMC.

We have responded to the BAMC's invitations in our 23 March 2018 letter (<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>[icann.org]).

As we have previously made clear to the BAMC, DotMusic rejects ICANN's attempt to impose artificial constraints on any additional submissions regarding Reconsideration Request 16-5. In order to provide ICANN with further substantive comments on the CPE Process Review, DotMusic must have (1) an opportunity to review the underlying documents, and is willing to enter into a confidentiality agreement to achieve that end; (2) sufficient time (at least 3 months) to review those documents; and (3) a meaningful opportunity to submit additional materials without a 10-page limit. ICANN must bear the necessary costs and expenses for DotMusic to review the documents and prepare additional submissions.

The BAMC must identify its specific concerns regarding Reconsideration Request 16-5 after reviewing DotMusic's additional submission, and provide DotMusic with the opportunity to make an *in-person* presentation that addresses those concerns. Furthermore, the BAMC's review of Reconsideration Request 16-5 must involve a substantive review of the merits of the .MUSIC CPE report, taking into account all of the submitted materials supporting the community priority application.

We would appreciate a response from the BAMC by 12 April 2018.

Sincerely,  
Rose Marie Wong

**Rose Marie Wong**  
Associate

**Dechert LLP**  
Contact Information Redacted

**From:** Reconsideration <[Reconsideration@icann.org](mailto:Reconsideration@icann.org)>  
**Date:** April 4, 2018 at 8:22:24 PM EDT  
**To:** Constantine Roussos Contact Information Redacted  
Contact Information Redacted  
**Cc:** Reconsideration <[Reconsideration@icann.org](mailto:Reconsideration@icann.org)>  
**Subject:** Update on Reconsideration Request 16-5

Dear Messrs. Roussos and Ali – The below email was intended to be addressed to you relating to Reconsideration Request 16-5. Our sincere apologies for the typo in the salutation.

Best regards,  
ICANN  
12015 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

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Dear Messrs. Baxter and Ali,

We write to follow up on the email below, in which we noted that the BAMC invites you to submit additional information relating to Request 16 5, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is 2 April 2018. To date, we have not received a supplemental submission from you or heard from you otherwise. We note that following the publication of CPE Process Review Reports, 2 February 2018, you submitted a report titled “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports.” ([https://www.icann.org/en/system/files/correspondence/roussos\\_to\\_marby\\_02feb18\\_en.pdf](https://www.icann.org/en/system/files/correspondence/roussos_to_marby_02feb18_en.pdf))[icann.org] If you would like us to deem that as DotMusic Limited’s additional submission in response to the CPE Process Review Process pursuant to the BAMC’s invitation, please advise. Or, if you intend to submit an additional submission, please advise.

In the email below, the BAMC also invited you to make a telephonic oral presentation to the BAMC in support of your reconsideration request and to let us know by 23 March if you would like to proceed with a telephonic presentation. We have also not heard from you on this issue.

Please advise by 6 April (1) whether you would like to treat the submission of 2 February 2018 as DotMusic Limited’s supplemental submission or if you intend to submit additional materials in support of Request 16 5 and if so, by when; and (2) whether you would like to proceed with a 30 minute telephonic presentation to the BAMC. Please include your availability for a 30 minute telephonic presentation in April and May with your response.

If we have not heard from you by 6 April 2018, we will presume that you do not intend to submit additional materials in support of Request 16 5 and that you do not wish to proceed with a telephonic presentation to the BAMC.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

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Dear Messrs. Roussos and Ali,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[icann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[icann.org\]](#) for the review the requests. In accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to submit additional information relating to Request 16 5, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16 5 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30 minute telephonic presentation in March and April with your response.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

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This e-mail is from Dechert LLP, a law firm, and may contain information that is confidential or privileged. If you are not the intended recipient, do not read, copy or distribute the e-mail or any attachments. Instead, please notify the sender and delete the e-mail and any attachments. Thank you.

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-5**

Requestor<sup>1</sup> submits this rebuttal to the BAMC’s Recommendation on Request 18-5 (the “**Recommendation**”).<sup>2</sup> The Recommendation affirmed the Resolutions and raised issues that Requestor will address in this rebuttal—specifically Requestor’s position regarding the BAMC’s invitation and the ICANN Board’s violations of the ICANN’s Bylaws.

### **1. Requestor’s Position Regarding the BAMC’s Invitation**

The Recommendation misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-5. It states, without further clarification, that Requestor rejected the BAMC’s invitation.<sup>3</sup> This description oversimplifies Requestor’s response to the BAMC’s invitation, which imposed significant constraints on its ability to fully address Reconsideration Request 16-5 in light of the CPE Process Review Reports. For instance, the invitation limited the written submission to ten pages and the BAMC presentation to a telephonic presentation.<sup>4</sup> In response, Requestor repeatedly asked for a meaningful opportunity to make additional submissions to ICANN regarding the CPE Process Review Reports.<sup>5</sup> Nearly three months have passed since Requestor first submitted its requests regarding the BAMC’s invitation; neither ICANN nor the BAMC have responded to Requestor.

### **2. The ICANN Board Failed to Comply with the ICANN Bylaws**

As explained in Reconsideration Request 18-5 (“**Request 18-5**”), the ICANN Board failed violated its obligations under the ICANN Bylaws by adopting the Resolutions.<sup>6</sup> Pursuant to the

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in DotMusic’s Reconsideration Request 18-5. *See* Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

<sup>2</sup> *See* Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018).

<sup>3</sup> *Id.* at p. 7.

<sup>4</sup> *See* Exhibit 34, Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process that Were Placed On Hold Pending Completion of the CPE Process Review (15 Feb. 2018); Exhibit 35, Email from R.M. Wong to ICANN Board (5 Apr. 2018).

<sup>5</sup> *Id.*; Exhibit 36, Letter from A. Ali to C. Chalaby and C. Disspain (23 Mar. 2018), pp. 4-5 (making several requests in response to the BAMC’s invitation).

<sup>6</sup> *See generally* Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

ICANN Bylaws, the ICANN Board must (1) “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act”<sup>7</sup> and “promote well-informed decisions based on expert advise;”<sup>8</sup> (2) “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment;”<sup>9</sup> and (3) operate “with efficiency and excellence.”<sup>10</sup> The Bylaws further require that ICANN carry “out its activities in conformity with relevant principles of international law and international conventions.”<sup>11</sup> The ICANN Board failed to adhere to these requirements when it adopted the Resolutions. Yet, the Recommendation supports the ICANN Board’s clear violations of these obligations and, in doing so, makes several misstatements that Requestor corrects below.<sup>12</sup>

**A. Requestor Presented Significant Evidence that the ICANN Board Violated Its Bylaws by Adopting the Resolutions**

Request 18-5 provides sufficient evidence to show that the ICANN Board failed to comply with the ICANN Bylaws. The Recommendation contends that “Requestor provides no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s ... commitments.”<sup>13</sup> Yet, even within Request 18-5, Requestor provided ICANN with significant evidence supporting its claims, such as the Expert

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<sup>7</sup> Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section 1.2(a)(iv).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at Article 1, Section, 1.2(a)(v).

<sup>10</sup> *Id.* at Article 1, Section 1.2(a)(iv).

<sup>11</sup> *Id.* at Article 1, Section 1.2(a). The Recommendation contends that ICANN “did not violate any relevant international law or convention” and that “Requestor does not have the ‘right’ to due process or other ‘constitutional’ rights with respect to the DIDP.” Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), pp. 17-18. Requestor has made its position clear in its Rebuttal to the BAMC’s Determination on Reconsideration Request 18-1, and incorporates its argument herein. *See* Exhibit 37, Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-1 (20 June 2018), pp. 3-4.

<sup>12</sup> Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), pp. 8-20.

<sup>13</sup> *Id.* at p. 9.

Opinion of Personal Data Redacted and the Council of Europe’s report.<sup>14</sup> These documents constitute evidence that support Requestor’s concerns about the CPE Process Review.<sup>15</sup>

ICANN has also prevented Requestor from obtaining additional evidence by refusing to disclose any documents related to the independent review in violation of its commitment to transparency. ICANN is required to operate “through open and transparent processes.”<sup>16</sup> Although the Recommendation denies that ICANN violated this obligation,<sup>17</sup> ICANN has continually refused to disclose relevant documents that would likely provide additional evidence in support of Requestor’s concerns.<sup>18</sup> Requestor has already shown that ICANN has failed to comply with its commitment to act with transparency in its prior submissions to ICANN, and incorporates these submissions herein.<sup>19</sup>

## **B. FTI Produced Methodologically Flawed CPE Process Review Reports**

The Recommendation misconstrues Requestor’s concerns about the ICANN Board’s actions. It states that “Requestor has identified no policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Review.”<sup>20</sup> Requestor has not argued that the ICANN Board breached its obligations because FTI failed to comply with a non-existent ICANN policy or procedure or because ICANN failed “to develop a

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<sup>14</sup> See, e.g., Exhibit 5, Letter from Personal Data Redacted to the BAMC (1 Feb. 2018); Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICAN Board, attaching the Second Expert Opinion of Personal Data Redacted (31 Jan. 2018); Exhibit 12, Expert Legal Opinion by Honorary Professor in International Copyright Personal Data Redacted (18 June 2016); Exhibit 13, Even Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017).

<sup>15</sup> See Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 19 (describing Requestor’s submissions as “Evidence”).

<sup>16</sup> Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Sections 1.2(a), 1.2(b)(ii) (ICANN must “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are countable and transparent.”).

<sup>17</sup> See Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 9.

<sup>18</sup> See, e.g., Exhibit 18, Request No. 20180110-1 (10 Jan. 2018); Exhibit 25, Request No. 20170505-1 (5 May 2017); Exhibit 28, Request No. 2017-0610-1 (19 June 2017).

<sup>19</sup> See Exhibit 38, Reconsideration Request 18-1 (10 Mar. 2018); Exhibit 39, Reconsideration Request 17-4 (25 July 2017); Exhibit 40, Reconsideration Request 17-2 (18 June 2017).

<sup>20</sup> Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), pp. 10-11.

particular methodology for the CPE Process Review.”<sup>21</sup> Rather, as described in Request 18-5, Requestor has argued that the ICANN Board’s actions violate the ICANN Bylaws because FTI did not adhere to a proper methodology in the CPE Process Review Reports.<sup>22</sup> This resulted in a methodologically flawed set of reports on the CPE process. The ICANN Board violated its Bylaws by failing to make a well-informed decision and failing to fairly apply its documented policies when it adopted these flawed reports.

Although FTI adopted a review standard for its independent review of the CPE process, it failed to adhere to this standard—resulting in methodologically flawed CPE Process Review Reports.<sup>23</sup> According to the Recommendation, the ICANN Board “relied on FTI to develop an appropriate methodology” for the review.<sup>24</sup> FTI adopted the “international investigative methodology” from the Association of Certified Fraud Examiners’ (“ACFE”) for the CPE Process Review.<sup>25</sup> As FTI explained in the CPE Process Review Reports, pursuant to the ACFE’s methodology, FTI was required to (1) formulate an investigative plan that identifies sources of relevant materials; (2) collect and review “*all* potentially relevant materials and documentation;” (3) interview relevant individuals deemed to have knowledge pertinent to the subject being investigated; (4) compare that documents with the interview information, which frequently results in follow-up interviews; and (5) re-analyze the documentation to prepare for writing the investigation report.<sup>26</sup> FTI failed to adhere to both this methodology and the ACFE’s guiding standards for such investigations.

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<sup>21</sup> *Id.* at p. 10.

<sup>22</sup> *See* Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

<sup>23</sup> Requestor reserves the right to contest FTI’s choice of investigative methodology for the CPE Process Review, which is not at issue in Request 18-5.

<sup>24</sup> Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 10.

<sup>25</sup> *Id.* at p. 13.

<sup>26</sup> Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 4 (emphasis added).

**First**, FTI failed to obtain and review “all potentially relevant materials and documentation”<sup>27</sup> as part of its independent review. The ACFE’s Code of Professional Standards requires that FTI “*obtain evidence and information that is **complete, reliable and relevant.***”<sup>28</sup> However, FTI based its independent review of the CPE Reports on information solely obtained from ICANN and the CPE Provider—the two organizations being reviewed—even though FTI could have obtained a significant amount of additional relevant information from the community applicants.<sup>29</sup> This information was not even complete. In response to FTI’s information requests, the CPE Provider refused to send FTI relevant documents, such as internal emails “relating to the CPE process and evaluations” among the CPE “evaluators.”<sup>30</sup> FTI did nothing in response to this refusal, and simply proceeded with its review without accounting for this missing information.

**Second**, FTI failed to interview all of the relevant individuals with “knowledge pertinent to the begin investigation.”<sup>31</sup> FTI had the capability to review the community applicants affected by the CPE Provider’s CPEs, but refused to talk with any of the applicants. FTI’s chosen excuse for refusing to obtain additional evidence from the community applicants, that “it would not be necessary or appropriate to interview the applicants in the court of the CPE Process Review” because “the CPE Provider evaluated the applications on the written record,”<sup>32</sup> is inexcusable. FTI was tasked with reviewing the CPEs to determine whether the “CPE criteria were applied consistently throughout each CPE report.”<sup>33</sup> It was not restrained by either the New gTLD Program Applicant Guidebook or the CPE Guidelines.

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<sup>27</sup> *Id.*

<sup>28</sup> Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8 (emphasis added).

<sup>29</sup> See Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

<sup>30</sup> *Id.* at pp. 7-8.

<sup>31</sup> *Id.* at p. 4.

<sup>32</sup> Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 12.

<sup>33</sup> Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 1.



Since FTI refused to interview the community applicants, the CPE Process Review Reports only relied on interviews with ICANN and CPE Provider staff.<sup>34</sup> FTI’s blanket acceptance of declarations made by ICANN and the CPE Provider is a significant problem with the FTI Reports as it does not consider “*the possibility of conjecture, unsubstantiated opinion and bias of witnesses and others*” in accordance with ACFE standards.<sup>35</sup> As explained above, FTI simply accepted that the documents and interview statements were accurate and free of bias—despite being from the organizations under review. Instead of critically examining this evidence, FTI (1) did not question the information from ICANN and the CPE Providers; (2) refused to address the significant amount of contrary findings from third parties; and (3) excluded evidence that provided a contrary viewpoint to ICANN and the CPE Provider by deliberately choosing not to interview applicants.<sup>36</sup> FTI thus based the CPE Process Review Reports on a purely one-sided representation of the CPE process in clear violation of the ACFE standards.

**Third,** FTI further did not exercise due professional care in conducting the CPE Process Review. In accordance with ACFE standards, FTI was required to discharge its professional responsibilities with “*diligence, critical analysis and professional skepticism.*”<sup>37</sup> FTI failed to achieve this objective because FTI simply accepted statements and information without further investigation or critical analysis. This is clearly exemplified in the third part of the CPE Process Review Reports, where FTI simply compiled the reference materials relied upon by the CPE Provider for the CPE Reports to conduct a cite-checking exercise.<sup>38</sup> FTI was *only* concerned with

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<sup>34</sup> Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 3-9.

<sup>35</sup> Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

<sup>36</sup> Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

<sup>37</sup> Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

<sup>38</sup> See generally Exhibit 42, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017).

determining whether the “reference[s] to the CPE Panel’s research” were reflected in the actual cited materials, *and not whether the underlying referenced research was true or accurate*.<sup>39</sup>

FTI clearly failed to critically analyze the information that it received and rather simply accepted the information as true without exercising any professional skepticism. This is evident in its interviews of the CPE Provider’s personnel as well. FTI interviewed only two CPE Provider personnel from the “core team.”<sup>40</sup> The independent evaluators examined a community application and applied the CPE criteria.<sup>41</sup> The core team simply met to discuss the evaluators’ completed work and helped resolve and different conclusions between the evaluators.<sup>42</sup> Despite the limited influence the two interviewees had in scoring the community applications, FTI accepted their broad statements as universally true for the entire evaluation process. For instance, the Recommendation explains that FTI’s interviews with the CPE Provider’s personnel confirmed that ICANN did not affect the CPE Provider’s CPEs and that the CPE Provider “never changed the scoring or the results based on ICANN organization’s comments.”<sup>43</sup> This conclusion on the actions of the independent evaluators for the CPE is based off of two interviews with CPE Provider personnel that *were not CPE evaluators*. Clearly, FTI’s generalizations are unreliable as they are based on claims made by two CPE core team members on the evaluation process under the purview of the independent evaluators. FTI’s actions have further rendered the entire CPE Process Reports significantly unreliable.

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<sup>39</sup> See *id.* at pp. 14-57.

<sup>40</sup> Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8 (distinguishing between the core team and the independent evaluators); see also Exhibit 43, Economist Intelligence Unit, “Community Priority Evaluation Panel and its Processes” (7 Aug. 2104), <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf> (“The Community Priority Evaluation panel comprises a core team, in addition to several independent1 evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-today management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”).

<sup>41</sup> Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8.

<sup>42</sup> *Id.* at pp. 8-9.

<sup>43</sup> Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 15.

FTI clearly failed to adhere to the methodology that it *chose to adopt* for the CPE Process Review Reports. By ignoring these failures in order to adopt the CPE Process Review Reports and attempt to justify the CPE Provider’s clearly discriminatory application of the CPE criteria in the CPE Reports, the ICANN Board violated its Bylaws-imposed obligations.

### **C. The CPE Process Review Reports Are Substantively Flawed**

The Recommendation further misconstrues Requestor’s concerns about the Resolutions. It argues that “FTI was Not Required to Agree with Others’ Substantive Conclusions and Did Not Fail to Engage in ‘Substantive Analysis.’”<sup>44</sup> Contrary to the Recommendation, Requestor has not contended that the “reconsideration is warranted because FTI’s conclusions differed from other opinions claiming that the CPE process is inconsistent.”<sup>45</sup>

Rather, the CPE Process Review Reports are substantively flawed because FTI did not *address* any of the independent evaluations. FTI states that it “carefully considered the *claims* raised in Reconsideration Requests and Independent Review Process ... proceedings” and the “*claim* that certain of the CPE criteria were applied inconsistently across the various CPEs.”<sup>46</sup> These simple declarations do not address the independent authority directly contradicting FTI’s conclusions. FTI must have examined the full scope of relevant evidence and then confirmed or rebutted the authorities with adequate analysis. FTI, though, instead chose to ignore their existence rather than directly rebut their conclusions. By failing to consider divergent views on the CPE Process, FTI produced a series of substantially flawed reports.

The CPE Process Reports are further flawed because FTI failed to substantively analyze the CPE Reports as part of its CPE Process Review. As described in **Section 2.B** above, FTI

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<sup>44</sup> *Id.* at p. 12.

<sup>45</sup> *Id.* at p. 13. Requestor reserves the right to contest the CPE Process Review Reports’ substantive conclusions, which are not at issue in this proceeding.

<sup>46</sup> Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 3 (emphasis added).

simply accepted statements and information without further investigation or critical analysis. FTI's immediate acceptance that both the research performed by the CPE Provider and the information it received from ICANN and the CPE Provider were fully true and accurate further emphasizes the lack of any substantive evaluation in its CPE Process Review. Avri Doria's statements regarding the CPE Process Review Reports are especially telling on this issue; they reveal that the ICANN Board was aware of the problems with "the rigor of the [CPE Process Review Reports] and some of its conclusions,"<sup>47</sup> but purposefully turned a blind eye to these issues in favor of rubber-stamping the CPE Process Review Reports and their conclusions.

The ICANN Board could therefore not have approved the Resolutions, which adopted the CPE Process Review Reports, without violating its obligation to act for the public benefit, make well-informed decisions based on expert advice, and apply documented policies consistently, neutrally, objectively, and fairly.

### 3. Conclusion

Therefore, it is clear that ICANN failed to comply with its Bylaws in passing the Resolutions. The BAMC further perpetuated this violation by recommending that the Board deny Request 18-5.<sup>48</sup> In addition to the reasons stated in the Request 18-5,<sup>49</sup> the Board should grant Request 18-5 and reject the CPE Process Review Reports.



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Arif Hyder Ali

29 June 2018

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Date

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<sup>47</sup> Exhibit 03, Avri Doria, ICANN Board Meeting Transcript (15 Mar. 2018), pp. 12-13.

<sup>48</sup> In its Recommendation, the BAMC noted that it "will consider the CPE Process Review Reports in the course of its evaluation of Request 16-5 ... but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-5." Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 19. Requestor appreciates this assurance from the BAMC.

<sup>49</sup> See generally Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

## REFERENCE MATERIALS – BOARD PAPER NO. 2018.07.18.XX

**TITLE:** **Consideration of Reconsideration Request 18-6**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 18-6.

Attachment A is [Reconsideration Request 18-6](#), submitted on 14 April 2018.

Attachment B is the [Ombudsman Action on Request 18-6](#), dated 14 June 2018.

Attachment C is the [BAMC Recommendation on Request 18-6](#) and Attachments [1](#), [2](#), and [3](#) in support thereof, issued 14 June 2018.

Attachment D is the Requestor's [Rebuttal](#) to the BAMC Recommendation on Request 18-6, submitted on 29 June 2018.

### **Background Links**

The following links are relevant to the Board's consideration of Reconsideration Request 18-6.

Exhibits 1 to 2 submitted in support of the Requestor's Rebuttal to the BAMC Recommendation on Request 18-6 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-exhibits-1-redacted-29jun18-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 11 July 2018

Email: amy.stathos@icann.org

## **Reconsideration Request Form**

Version of 1 October 2016

ICANN's Board Governance Committee (BGC) is responsible for receiving requests for review or reconsideration (Reconsideration Request) from any person or entity that believes it has been materially and adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

The person or entity submitting such a Reconsideration Request is referred to as the Requester.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

## 1. Requester Information

Requesters are represented by:

**Name:** Flip Petillion, Jan Janssen, PETILLION bvba

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

Requesters are:

### **Requester #1**

**Name:** Travel Reservations SRL ('TRS', formerly Despegar Online SRL)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

### **Requester #2**

**Name:** Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

### **Requester #3**

**Name:** Radix FZC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

And its subsidiary applicant:

**Name:** dot Hotel Inc.

**Address:** Contact Information Redacted

Contact Information Redacted

**Email:** Contact Information Redacted

#### **Requester #4**

**Name:** Fegistry LLC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

#### **2. Description of specific action you are seeking to have reconsidered.**

ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11, taken on 15 March 2018 (hereinafter, the 'Decision').

#### **3. Date of action/inaction:**

15 March 2018

#### **4. On what date did you become aware of the action or that action would not be taken?**

Requesters became aware of the Decision on 20 March 2018. ICANN informed Requesters via email on 19 March 2018 at 11:04 pm CET.

#### **5. Describe how you believe you are materially and adversely affected by the action or inaction:**

Through its ICANN, the ICANN Board failed to offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the CPE process and the CPE Review Process.

The Decision makes a meaningful review of main arguments expressed by Requesters impossible. Indeed, Requesters urged the ICANN Board to address



Requesters' concerns and to hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review. Unless the ICANN Board simply decides to cancel HTLD's application – which it ought to do for the reasons set out in Reconsideration Request 16-11 – the ICANN Board must address the fatal flaws of the CPE and the CPE Process Review, as identified by Requesters in the framework of Reconsideration Request 16-11. These fatal flaws cannot be addressed if the ICANN Board were to uphold its Decision, in which it accepts the findings of the CPE Process Review and finds that no overhaul or change to the CPE process is necessary. Unless the ICANN Board decides to cancel HTLD's application, upholding the Decision would preclude the ICANN Board from granting the remedies requested by Requesters in the framework of Reconsideration Request 16-11 and unjustly deprive Requesters from a meaningful review.

Without a meaningful review of Requesters' complaints, Requesters – who had applied for the gTLD string .hotel themselves – risk being prevented from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

Requesters manifestly meet the standing requirements for a Request for Reconsideration (RfR) and ultimately an IRP.

**6. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN's failure to follow the policies created by the GNSO as well as its own Bylaws, Articles of Incorporation, Commitments and Core values creates

inconsistency, injects unfairness and a lack of transparency in the process, and calls into question the fairness of the gTLD program as a whole.

This situation will inevitably have a chilling effect on new entrants into the gTLD space.

## **7. Detail of the ICANN Action/Inaction**

ICANN's challenged action is (i) contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies); and (ii) taken without consideration of material information.

Since 27 July 2017 already, Requesters are asking for more transparency about the community priority evaluation (CPE) process and the CPE Process Review.

On 16 January 2017, Requesters informed ICANN that the concerns about the lack of transparency remained unaddressed despite ICANN's publication of the report of the CPE process reviewer. Requesters reiterated and further substantiated their concerns in their letters of 1 February 2018 and 22 February 2018.

Requesters asked that ICANN and the ICANN Board address Requesters' concerns and hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review. Requesters made clear that, in addition to the lack of transparency in the CPE process and the CPE Process Review, they were concerned about the methodology used by the CPE Process

reviewer, and about the due process and policy violations, disparate treatment and inconsistencies that had not been considered.

On 15 March 2018, the ICANN Board accepted the findings set forth in the CPE Process Review Reports and decided that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary. In doing so, the ICANN Board simply rubberstamped the BAMC's recommendation to accept the CPE Process Reviewer's findings concerning the CPE Process Review. No explanation whatsoever is given as to why the ICANN Board accepted the BAMC's recommendation.

Moreover, both the BAMC's recommendation and the ICANN Board's acceptance of this recommendation were made without considering Requester's well-substantiated arguments against accepting the findings set forth in the CPE Process Review Reports. The BAMC and the ICANN Board failed to address any of the fatal flaws of the CPE process and of the CPE Process Review.

As these flaws have already been explained in the framework of Reconsideration Request 16-11, Requesters will not repeat them here. In sum, Requesters have clearly established that:

- i. ICANN's organisation of the CPE Process Review lacked transparency
- ii. The CPE Process Review itself was not transparent and has been executed without the necessary diligence and care
- iii. The CPE Process Review revealed a lack of independence of the CPE provider

- iv. The CPE Process Reviewer failed to analyse the consistency issues of CPE decisions

Accepting the results of the CPE Process and of the CPE Process Review without addressing these flaws is inconsistent with ICANN's Mission, Commitments and Core Values. ICANN's acceptance of the results of the CPE Process and of the CPE Process Review is not a consistent, neutral, objective and fair application of ICANN's documented policies.

In addition, the lack of transparency surrounding the CPE Process Review made it impossible for anyone, including the ICANN Board, to assess the weight of the conclusions made by the CPE Process Reviewer. Although the scope of the CPE Process Review was too limited, the review revealed that the CPE Provider was not independent. The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not discuss or consider the various fairness, nondiscrimination and consistency objections. The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not ask whether the criteria the CPE Panel claimed to apply were the criteria laid out in the Applicant Guidebook and GNSO Policy. The approach followed by the CPE Process Reviewer was a "description" of the CPE Panel's reports, but not an "evaluation" to determine whether the CPE Panel's reports were actually following the applicable guidelines in a neutral and nondiscriminatory manner.

**8. What are you asking ICANN to do now?**

In addition to the Request, made in the framework of Reconsideration Request 16-11, Requesters request that – unless ICANN finally decides to cancel HTLD’s application – ICANN reconsiders the ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 and reverses the decisions in which the ICANN Board (i) accepted the findings set forth in the CPE Process Review Reports, (ii) concluded that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary, (iii) declared that the CPE Process Review has been completed.

In the event that ICANN does not immediately reverse its Decision, Requesters ask that ICANN engage in conversations with Requesters and that a hearing is organised. In such event, Requesters request that, prior to the hearing, ICANN provides full transparency regarding all communications between (i) ICANN, the ICANN Board, ICANN’s counsel and (ii) the CPE Process Reviewer. Requesters ask ICANN to provide full transparency on its consideration of the CPE Process and the CPE Process Review and to list and give access to all material the BAMC and the ICANN Board considered during its meetings on the CPE Process and the CPE Process Reviews.

For reasons of procedural economy, Requesters propose that this request for reconsideration be handled together with Reconsideration Request 16-11 that was put on hold pending completion of the CPE Process Review.

**9. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.**

Maintaining the Decision would mean that the ICANN Board fails to offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the CPE process and the CPE Review Process made in the framework of Reconsideration Request 16-11. The lack of a meaningful review directly harms the Requesters, as they are not offered a fair chance to defend their applications for .hotel. Without a meaningful review of Requesters' complaints, Requesters – who had applied for the gTLD string .hotel themselves – risk being prevented from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

In addition, Requesters have invested significant time and effort in defending their application for .hotel against the unreasoned and inconsistent advice of the CPE panel, given in contravention of ICANN's Articles of Incorporation and Bylaws. As a result of (i) ICANN's acceptance of this advice in contravention of its Mission, Commitments, Core Values and policies Mission, and (ii) ICANN's failure to address the insufficiencies of this advice and the review of the advice (also in contravention of ICANN's Mission, Core Values and policies), the Requesters' applications for .hotel have all suffered unnecessary delays and are currently experiencing further delays because of the Decision.

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it reverses the harm that would

result from not being given a fair opportunity to defend their application for .hotel. Unless ICANN finally decides to cancel HTLD's application, a reversal of the Decision is necessary to ensure a meaningful review of Requesters' pending Reconsideration Request 16-11.

**10. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**10a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.**

Requesters' harm is identical, as explained in section 5 above and in Reconsideration Request 16-11.

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

At this stage, all relevant documents are believed to be in ICANN's possession.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction.

The Board Governance Committee may dismiss a Reconsideration Requests if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BGC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BGC shall be documented and promptly (i.e., as soon as practicable) posted on the ICANN Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BGC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BGC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BGC. The ICANN Board's decision on the BGC's recommendation is final and not subject to a Reconsideration Request.



Signature

14 April 2018

Date



**Subject:** Re: [Reconsideration Request] Reconsideration Requests 18-6  
**Date:** Wednesday, May 23, 2018 at 1:59:16 PM Pacific Daylight Time  
**From:** Herb Wayne (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman

Reconsideration Request 18-6

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-6.

Best regards,

Herb Wayne  
ICANN Ombudsman

<https://www.icann.org/ombudsman> [icann.org]

<https://www.facebook.com/ICANNOmbudsman> [facebook.com]

Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf> [icann.org]

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en> [icann.org]

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Saturday, May 19, 2018 at 7:20 PM  
**To:** ombudsman <ombudsman@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Requests 18-4, 18-5, and 18-6

Dear Herb,

On 13 and 14 April 2018, the following Reconsideration Requests were submitted seeking reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11, which resolved the Community Priority Evaluation (CPE) Process Review:

- Request 18-4 filed by dotgay LLC
- Request 18-5 filed by DotMusic Limited

- Request 18-6 filed by Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., Fegistry LLC

The Requests have been published on the Reconsideration page and are also attached.

The Board Accountability Mechanisms Committee (BAMC) has determined that Requests 18-4, 18-5, and 18-6 are sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Requests 18-4, 18-5, and 18-6 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Requests 18-4, 18-5, and 18-6 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of the Requests.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-6  
14 JUNE 2018**

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The Requestors, Travel Reservations SRL, Fegistry LLC, Minds + Machines Group Limited, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) seek reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the 2018 Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.<sup>1</sup>

**I. Brief Summary**

The Requestors each submitted standard applications for the .HOTEL generic top-level domain (gTLD). Another applicant, Hotel Top-Level Domain S.a.r.l (HTLD), submitted a community-based application for .HOTEL (HTLD Application). HTLD participated and prevailed in CPE. As a result, HTLD was awarded priority for the .HOTEL string thereby eliminating all other applicants for the .HOTEL string, including the Requestors' applications.

Following the CPE of HTLD Application, some of the Requestors challenged the HTLD CPE Report through the Reconsideration process (Reconsideration Requests 14-34<sup>2</sup> and 14-39<sup>3</sup>) and the independent review process (IRP) (Despegar IRP).<sup>4</sup> On 12 February 2016, the Despegar IRP Panel declared ICANN to be the prevailing party in the Despegar IRP.<sup>5</sup>

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<sup>1</sup> Request 18-4, § 3, at Pg. 1.

<sup>2</sup> See Reconsideration Request 14-34, available at <https://www.icann.org/resources/pages/14-34-2014-07-01-en>.

<sup>3</sup> See Reconsideration Request 14-39, available at

<sup>4</sup> See Despegar IRP Panel Declaration, available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>. Travel Reservations SRL (one of the Requestors) was formerly known as Despegar Online SRL. Request 16-11, § 1, at Pg. 2, available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

<sup>5</sup> See Despegar IRP Panel Declaration, available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

The Board accepted the findings of the Despegar IRP Panel,<sup>6</sup> and directed that the HTLD Application move forward to the next stage of the New gTLD Program (the 2016 Resolutions).<sup>7</sup> Thereafter, a group of standard applicants for the .HOTEL gTLD, including the Requestors, submitted Reconsideration Request 16-11 (Request 16-11), seeking reconsideration of the 2016 Resolutions.<sup>8</sup>

While Request 16-11 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>9</sup> The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.<sup>10</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.<sup>11</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>12</sup>

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<sup>6</sup> ICANN Board Resolutions 2016.03.10.10 – 2016.03.10.11, available at <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

<sup>7</sup> *Id.*

<sup>8</sup> Request 16-11.

<sup>9</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>10</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>11</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, see <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

<sup>12</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>13</sup>

On 14 April 2018, the Requestors submitted Request 18-6, challenging the 2018 Resolutions.<sup>14</sup> The Requestors claim that the 2018 Resolutions are contrary to ICANN org's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>15</sup>

The BAMC has considered Request 18-6 and all relevant materials and recommends that the Board deny Request 18-6 because the Board considered all material information when it adopted the 2018 Resolutions, which are consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.<sup>16</sup> The CPE Process Review Reports identify the materials considered by FTI.<sup>17</sup> Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.<sup>18</sup>

## **II. Facts.**

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<sup>13</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>14</sup> Request 18-6, § 2, at Pg. 3, available at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

<sup>15</sup> *Id.* § 7, at Pg. 6-7.

<sup>16</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>17</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>18</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

**A. The CPE Provider’s Evaluation of the HTLD Application.**

HTLD submitted a community-based application for .HOTEL.<sup>19</sup> The Requestors each submitted standard (meaning, not community-based) applications for .HOTEL, and all of the .HOTEL applications were placed into a contention set. HTLD was invited to, and did, participate in CPE for .HOTEL.<sup>20</sup>

On 11 June 2014, the CPE Provider issued a CPE report, concluding that the HTLD Application prevailed in CPE.<sup>21</sup>

The Requestors have challenged the CPE Provider’s determination that the HTLD Application satisfied the requirements for community priority, and the Board’s decision not to cancel the HTLD Application, via numerous DIDP Requests, Reconsideration Requests, and the Despegar IRP. All of those challenges have been resolved, with the exception of Request 16-11, which is pending.

The Requestors submitted Request 16-11 on 25 August 2016, asserting that the 2016 Resolutions are inconsistent with ICANN’s Articles of Incorporation and Bylaws.<sup>22</sup>

**B. The CPE Process Review.**

While Request 16-11 was still pending, ICANN’s Board, as part of the Board’s oversight of the New gTLD Program, directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.<sup>23</sup> The Board’s

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<sup>19</sup> See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1562>.

<sup>20</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. See Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>21</sup> See CPE Report at Pg. 1, available at <https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

<sup>22</sup> Request 16-11, § 6, at Pg. 6 available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

<sup>23</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

action was part of the ongoing discussions regarding various aspects of the CPE process as well as issues that were identified in the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC (Dot Registry IRP).<sup>24</sup>

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.<sup>25</sup> The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>26</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-11, would be on hold until the CPE Process Review was completed.<sup>27</sup>

On 13 December 2017, ICANN organization published CPE Process Review Reports.<sup>28</sup>

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.<sup>29</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>26</sup> *Id.*

<sup>27</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>28</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>29</sup> Scope 1 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

FTI also concluded that “ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization’s comments.”<sup>30</sup>

For Scope 2, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”<sup>31</sup>

For Scope 3, “FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider’s working papers to the extent that such material was not otherwise cited in the final CPE report.”<sup>32</sup> FTI observed that all eight of the relevant CPE reports (which are the ones at issue in the Reconsideration Requests placed on hold) referenced research. Two of the eight relevant CPE reports included citations for each reference to research. Of the remaining six relevant CPE reports, while the reports did not include citations to each reference to research, in five of the six instances, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports. In the other instance (for which two CPE reports were done on the same application) FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. However, FTI did find citations to the research referenced in the Second CPE Report in the working papers underlying the First CPE Report.<sup>33</sup>

Accordingly, based on FTI’s observations, it is possible that the research being referenced in the

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<sup>30</sup> *Id.*, at Pg. 9, 15.

<sup>31</sup> Scope 2 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>32</sup> Scope 3 Report, at Pg. 3-4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>33</sup> *Id.* at Pg. 4.



relevant CPE report was the research for which citations were found in the working papers underlying the first CPE on that particular application.<sup>34</sup>

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>35</sup>

The Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),<sup>36</sup> and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).<sup>37</sup> The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.<sup>38</sup>

The Board noted that the requestors with pending reconsideration requests each will have an opportunity to submit supplemental materials

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<sup>34</sup> *Id.* at Pg. 34.

<sup>35</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>36</sup> Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

<sup>37</sup> 2018 Resolutions. See also Roadmap, available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

<sup>38</sup> Roadmap, at Pg. 2.

and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.<sup>39</sup>

### C. The Requestors' Response to the CPE Process Review.

On 16 January 2018, the Request 16-11 Requestors submitted a letter to the BAMC concerning the CPE Process Review Reports.<sup>40</sup> They stated that “a first cursory review of the report[s] already shows that Requestors’ concerns about the lack of transparency remain unaddressed.”<sup>41</sup> The Request 16-11 Requestors were “concerned about the methodology used by [FTI], and about due process and policy violations, disparate treatment and inconsistencies that have not been considered.”<sup>42</sup> The Requestors stated that they “trust[ed] that . . . ICANN shall hear Request[o]rs before proceeding further in this matter.”<sup>43</sup>

On 1 February 2018, the Request 16-11 Requestors submitted a second letter to the BAMC expressing concerns about the CPE Process Review’s transparency, methodology, and scope. The Request 16-11 Requestors asked the BAMC to “address these inconsistencies—in the event that you do not simply decide to cancel HTLD’s application . . . and to ensure a meaningful review of the CPE regarding .hotel.”<sup>44</sup>

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Request 16-11 Requestors to “submit additional information relating to Request 16-11, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2

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<sup>39</sup> *Id.*

<sup>40</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>.

<sup>41</sup> *Id.* at Pg. 1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at Pg. 2.

<sup>44</sup> *Id.* at Pg. 4.

April 2018. The BAMC also invited the Request 16-11 Requestors to “make a telephonic oral presentation to the BAMC in support of” Request 16-11. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials.”<sup>45</sup> On 22 March 2018, the Request 16-11 Requestors accepted the BAMC’s invitation to make a telephonic presentation and asked for an extension on its deadline to 9 April 2018 submit additional materials in support of Request 16-11,<sup>46</sup> which the BAMC granted.<sup>47</sup>

On 9 April 2018, the Request 16-11 Requestors submitted a letter to the Board concerning the 2018 Resolutions, asserting that the Board passed the 2018 Resolutions “without considering Request[o]rs’ arguments against accepting the findings set forth in the CPE Process Review Reports,” and “[i]nstead . . . considered that Request[o]rs will have the opportunity to address their arguments in support of . . . Request 16-11.”<sup>48</sup> The Request 16-11 Requestors claimed that the 2018 Resolutions “make[] a meaningful review of [the] main arguments expressed by Request[o]rs impossible” and that “upholding [the 2018 Resolutions] would preclude the ICANN Board from granting the remedies requested by Request[o]rs in the framework of . . . Request 16-11.”<sup>49</sup> The Request 16-11 Requestors concluded that the 2018 Resolutions were “either careless and incompetent or prejudiced.”<sup>50</sup>

#### **D. Request 18-6.**

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<sup>45</sup> Attachment 1, 19 March 2018 Email from ICANN to the Requestor.

<sup>46</sup> Attachment 2, 22 March 2018 Email from the Requestor to ICANN.

<sup>47</sup> Attachment 3, 23 March 2018 Email from ICANN to the Requestor.

<sup>48</sup> 9 April 2018 letter from Petillion to Board at Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-09apr18-en.pdf>.

<sup>49</sup> *Id.* at Pg. 1-2.

<sup>50</sup> *Id.* at Pg. 2.

On 14 April 2018, the Requestors submitted Request 18-6, challenging the 2018 Resolutions.<sup>51</sup> As they did in the above-referenced correspondence concerning Request 16-11, the Requestors asserted that the 2018 Resolutions “would preclude the ICANN Board from granting the remedies requested by Request[o]rs in the framework of Reconsideration Request 16-11, and unjustly deprive Request[o]rs from a meaningful review.”<sup>52</sup> The Requestors incorporated the concerns they raised “in the framework of Reconsideration Request 16-11” and reiterated their concerns about the CPE Process Review’s transparency, methodology, and scope.<sup>53</sup> The Requestors claimed that the 2018 Resolutions are contrary to ICANN organization’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>54</sup> The Requestors also requested that Request 18-6 and Request 16-11 be heard together.<sup>55</sup>

#### **E. Relief Requested**

The Requestors ask the BAMC to:

1. “[R]everse” the 2018 Resolutions;
2. Grant Requestors a hearing;
3. “[P]rovide[] full transparency regarding all communications between (i) ICANN, the ICANN Board, ICANN’s counsel and (ii) the CPE Process Reviewer”; and
4. “[P]rovide full transparency on its consideration of the CPE Process and the CPE Process Review and to list and give access to all material the BAMC and the ICANN Board considered during its meetings on the CPE Process and the CPE Process

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<sup>51</sup> Request 18-6, § 2, at Pg. 3.

<sup>52</sup> *Id.* § 5, at Pg. 4.

<sup>53</sup> *Id.* § 7, at Pg. 5-7.

<sup>54</sup> *Id.* § 7, at Pg. 6-7.

<sup>55</sup> *Id.* § 8, at Pg. 8.

Review.”<sup>56</sup>

### **III. Issue Presented.**

The issue is whether the Board’s adoption of the 2018 Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies). The BAMC will not consider Request 16-11 in conjunction with Request 18-6 because the Requests were filed under different Bylaws with different standards for Reconsideration and involve different subject matters. Further, while Article 4, Section 4.2(j) of the Bylaws allow different Reconsideration Requests to be heard as the same time, as long as “(i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction,”<sup>57</sup> here, the two Requests involve different actions. Accordingly, the sole issue here is, as referenced above, whether the Board’s adoption of the 2018 Resolutions contracted ICANN’s Missions, Commitments, Core Values and/or established ICANN policy(ies).

### **IV. The Relevant Standards for Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.<sup>58</sup>

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<sup>56</sup> Request 18-6, § 8, at Pg. 8.

<sup>57</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(j).

<sup>58</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>59</sup> Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>60</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>61</sup>

On 19 May 2018, the BAMC determined that Request 18-6 is sufficiently stated and sent Request 18-6 to the Ombudsman for review and consideration.<sup>62</sup> The Ombudsman thereafter recused himself from this matter.<sup>63</sup> Accordingly, the BAMC has reviewed Request 18-6 and issues this Recommendation.

## **V. Analysis and Rationale.**

### **A. The 2018 Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).**

The Requestors’ criticisms of the Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. But, the Requestors provide no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with

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<sup>59</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>60</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>61</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>62</sup> Ombudsman Action Regarding Request 18-6, Pg. 2, <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

<sup>63</sup> Ombudsman Action Regarding Request 18-6, Pg. 1.

efficiency and excellence. Rather, it appears that the Requestors simply do not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. The CPE Process Review Satisfied Applicable Transparency Obligations.

The Requestors argue that the CPE Process Review—and therefore the 2018 Resolutions—are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>64</sup> Specifically, the Requestors believe that the CPE Process Review lacked transparency concerning: (1) “the selection process for the CPE process reviewer ([FTI]), and the names and curricula vitae of the FTI individuals involved in the review”; (2) the “instructions FTI received from ICANN [organization]”; (3) the “criteria and standards that FTI used to perform the CPE process review”; (4) the “documents or the recordings of the interviews on which [FTI’s] findings are based”; and (5) the “questions that were asked during [FTI’s] interviews.”<sup>65</sup>

As an initial matter, ICANN org provided details concerning the selection process for the CPE process reviewer almost one year ago, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner.<sup>66</sup> In the same document, ICANN org provided information concerning the scope of FTI’s investigation.<sup>67</sup> Similarly, the CPE Process Review Reports themselves provide extensive detail concerning FTI’s “criteria and standards”

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<sup>64</sup> Request 18-6, § 7, at Pg. 6-7.

<sup>65</sup> 1 February 2018 letter from Petition to BAMC at Pg. 1-2, available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>.

<sup>66</sup> See CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>67</sup> See *id.*

for conducting the CPE Process Review.<sup>68</sup> Accordingly, none of these arguments support reconsideration.

Concerning FTI's documents, recordings, and interview questions, as noted in the CPE Process Review Reports, many of the materials that FTI reviewed are publicly available documents, and are equally available to the Requestors.<sup>69</sup> Additionally, FTI requested, received, and reviewed (1) emails from ICANN organization (internal to ICANN personnel as well external emails exchanged with the CPE Provider) and (2) the CPE Provider's working papers, including draft reports, notes, and spreadsheets.<sup>70</sup> While the Requestors did not file a request for documentary information pursuant to the Documentary Information Disclosure Policy (DIDP), these materials are the subject of two DIDP Requests, which were submitted by parties in January 2018. ICANN organization considered the request and concluded that ICANN organization explained that those documents would not be made publicly available because they were subject to certain Nondisclosure Conditions.<sup>71</sup> These same Nondisclosure Conditions apply to the Requestors' claim. Moreover, the reasoning set forth in the BAMC's Recommendations on Reconsideration Requests 18-1 and 18-2, denying reconsideration on those DIDP Responses are applicable here and are therefore incorporated herein by reference.<sup>72</sup> The Requestors here provide no evidence that ICANN org's decision not to disclose these materials contravened any

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<sup>68</sup> See, e.g., FTI Scope 1 Report at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>69</sup> Scope 1 Report at Pgs. 3-6.

<sup>70</sup> *Id.* at Pg. 6.

<sup>71</sup> See ICANN organization Response to DIDP Request 20180115-1, at Pg. 21-22, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>72</sup> See BAMC Recommendation on Request 18-1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>; see also BAMC Recommendation on Request 18-2, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.



applicable policies, or ICANN’s Mission, Commitments, or Core Values. Accordingly, this argument does not support reconsideration.

2. The Requestors’ Challenges to FTI’s Methodology Do Not Warrant Reconsideration.

The Requestors assert that the Board should not have acknowledged or accepted the CPE Process Review Reports because FTI’s methodology was flawed.<sup>73</sup> Specifically, the Requestors complain that FTI: (1) did not explain why the CPE Provider refused to produce email correspondence; and (2) did not try to contact former employees of the CPE Provider.<sup>74</sup>

As a preliminary matter, FTI, not the Board or ICANN organization, defined the methodology for the CPE Process Review Reports.<sup>75</sup> The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.<sup>76</sup> The Requestors have not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

With respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.<sup>77</sup> FTI also received and reviewed emails (and attachments) produced by ICANN organization between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations.<sup>78</sup> The Requestors are correct that FTI

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<sup>73</sup> 1 February 2018 letter from Petillion to BAMC at Pg. 2., available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>. See also Request 18-6, § 7, at Pg. 7.

<sup>74</sup> 1 February 2018 letter from Petillion to BAMC, at Pg. 2.

<sup>75</sup> See, e.g., Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>76</sup> See CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>77</sup> See Scope 2 Report at Pg. 7-8.

<sup>78</sup> See Scope 2 Report at Pg. 7-8.

requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”<sup>79</sup> No policy or procedure exists that would require ICANN organization to reject the CPE Process Review Reports because the CPE Provider did not produce internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process review.<sup>80</sup> Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.<sup>81</sup> Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has not identified a policy or procedure requiring FTI to do more (including to explain why it did not seek out former employees) because none exists. Reconsideration is not warranted on this ground.

The Requestors also claim that FTI’s methodology was flawed because FTI did not identify that the CPE Provider determined that the HTLD Application “provided for an appeal system,” when in fact the application “d[id] not provide for an appeal system” as required under

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<sup>79</sup> See *id.* See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services\_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>80</sup> EIU Consulting Agreement Statement of Work #2 at Pg. 9.

<sup>81</sup> Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

Criterion 3, Registration Policies.<sup>82</sup> The Requestors claim that “[t]he Despegar et al. IRP Panel considered [this] inconsistenc[y] to have merit,” and the “existence of said inconsistencies has never been contested.”<sup>83</sup> This assertion as to the Despegar IRP Panel Declaration is an overstatement. The Despegar IRP Panel stated that: (1) ICANN org had confirmed that the CPE Provider did not have a “process for comparing the outcome of one CPE evaluation with another in order to ensure consistency,” nor did ICANN organization have a process for doing so; and that (2) “[m]uch was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations, . . . some of which, *on the basis solely of the arguments provided by [the Requestors]*, have some merit.”<sup>84</sup> The Despegar IRP Panel did not make a determination concerning these arguments, nor was it asked to. Accordingly, the IRP Panel’s side note concerning the Requestors’ allegations of inconsistencies does not support reconsideration.

3. The Requestors’ Challenge to the Scope of the CPE Process Review Does Not Warrant Reconsideration.

The Requestors’ remaining complaints about the CPE Process Review Reports all relate to the scope of FTI’s investigation.<sup>85</sup> The Requestors believe that FTI “sum[med] up” but did not “analyze” “the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria,” that it did not analyze “the inconsistencies invoked by applicants in [reconsideration requests], IRPs or other processes,” and that FTI “did not examine the gTLD applications underlying the CPE [evaluations].”<sup>86</sup> Essentially, the Requestors wanted

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<sup>82</sup> 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing Despegar IRP Panel Declaration, ¶ 146.

<sup>83</sup> *Id.* at Pg. 4

<sup>84</sup> Despegar IRP Panel Declaration, ¶ 146 (emphasis added).

<sup>85</sup> See 1 February 2018 letter from Petillion to BAMC, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>. See also Request 18-6, § 7, at Pg. 7.

<sup>86</sup> *Id.*

FTI to substantively re-evaluate the CPE applications, which was beyond the scope of the CPE Process Review. Therefore, the Requestor’s arguments concerning the scope of the CPE Process Review do not support reconsideration of the HTLD CPE Report.

4. The 2018 Resolutions Are Consistent with ICANN’s Mission, Commitments, Core Values, and Established Policy(ies).

Finally, the Requestors assert that the Board should reconsider the 2018 Resolutions because they are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner,<sup>87</sup> and they will prevent Requestors from obtaining “a meaningful review of their complaints regarding HTLD’s application for .hotel, the CPE process and the CPE Review Process.”<sup>88</sup> Relatedly, the Requestors make a passing reference to a concern about “due process . . . violations.”<sup>89</sup>

As an initial matter, the BAMC notes that when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>90</sup> The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-11 (just as the BAMC will consider all of the materials submitted by the Requestors in connection with Request 16-11), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-11.

The BAMC will carefully review and consider all of the materials that the Requestors submitted in support of Request 16-11. The BAMC notes that it provided the Requestors an

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<sup>87</sup> Request 18-6, § 7, at Pg. 6-7.

<sup>88</sup> *Id.* § 5, at Pg. 3.

<sup>89</sup> 16 January 2018 letter from Petillion to BAMC, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>.

<sup>90</sup> See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

opportunity to make a telephone presentation concerning the effect of the CPE Process Review on Request 16-11, which the Requestors accepted. The BAMC will consider all of the Requestors' arguments, and consider the CPE Process Review Reports as one of many reference points in its consideration of Request 16-11. Accordingly, reconsideration is not warranted based on the argument that the BAMC will consider the CPE Process Review Reports to the exclusion of the Requestors' submissions in Request 16-11.

As to the Requestors' due process claims, the BAMC recognizes ICANN org's commitment to conform with *relevant* principles of international law and conventions. However, any commitment to provide due process is voluntary and not coextensive with government actors' obligations. Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN organization, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>91</sup> Pursuant to this explicit authority, ICANN org established the Reconsideration Request and IRP processes, as well as the procedures that would govern those processes. ICANN organization was not required to establish any internal corporate accountability mechanism, but instead did so voluntarily. Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to ICANN's accountability mechanisms.

Even if ICANN organization *did* have due process obligations, and even though the "rights" the Requestors invoke do not apply to corporate accountability mechanisms, the Requestors have not explained how the alleged misapplication of ICANN org's policies resulted in a denial of due process. ICANN org *did* take due process into account when it designed the

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<sup>91</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

accountability mechanisms, including the Reconsideration Request process that the Requestors exercised by submitting Request 16-11 and the IRP Process that the Requestors exercised in the Despegar IRP. ICANN org’s accountability mechanisms—that is, Reconsideration Requests and the Independent Review Process—consider the CPE Provider’s compliance with the Guidebook and with ICANN organization’s Articles of Incorporation and Bylaws. They consider whether the CPE Provider complied with its processes, which requires the adjudicator (the BAMC, Board, or an Independent Panel) to consider the outcome in addition to the process.

Accordingly, the accountability mechanisms, including this reconsideration request, provide affected parties like the Requestor with avenues for redress of purported wrongs, and substantively review the decisions of third-party service providers, including the CPE Provider. This is not grounds for reconsideration.

For all of the reasons discussed above, reconsideration is not warranted.

## **VI. Recommendation**

The BAMC has considered the merits of Request 18-6 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments and Core Values when it passed the 2018 Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-6.

ATTACHMENT 1 TO BAMC RECOMMENDATION

**Subject:** [Reconsideration Request] Update on Reconsideration Request 16-11  
**Date:** Monday, March 19, 2018 at 3:04:26 PM Pacific Daylight Time  
**From:** Reconsideration (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Flip Petillion  
**CC:** Reconsideration  
**Attachments:** ATT00001.txt

Dear Mr. Petillion,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[icann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[icann.org\]](#) for the review the requests. In accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to submit additional information relating to Request 16-11, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30-minute telephonic presentation in March and April with your response.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094



ATTACHMENT 2 TO BAMC RECOMMENDATION

**Subject:** Re: [Reconsideration Request] Update on Reconsideration Request 16-11  
**Date:** Thursday, March 22, 2018 at 2:38:40 PM Pacific Daylight Time  
**From:** Flip Petillion (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**Attachments:** image001.png, ATT00001.txt

Dear Members of the Board,

We hereby accept your invitation to make a telephonic presentation. We are available in the week of 23 April between 9:00 and 17:00 UTC.

In view of the upcoming Easter holiday and the fact that I represent a consortium of different applicants, I respectfully request to extend the deadline to submit the additional submission until 9 April 2018.

Thank you in advance.

Best regards,

Flip Petillion  
Contact Information Redacted

[www.petillion.law](http://www.petillion.law)

Contact Information Redacted

[petillion.law](http://petillion.law)

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Monday, 19 March 2018 at 23:04  
**To:** Flip Petillion Contact Information Redacted  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Update on Reconsideration Request 16 11

Dear Mr. Petillion,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[icann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[icann.org\]](#) for the review the requests. In accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to submit additional information relating to Request 16-11, provided that the submission is limited to any new

information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[icann.org\]](http://Roadmap[icann.org]), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30-minute telephonic presentation in March and April with your response.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

ATTACHMENT 3 TO BAMC RECOMMENDATION

**Subject:** [Reconsideration Request] Update on Reconsideration Request 16-11  
**Date:** Friday, March 23, 2018 at 3:11:32 PM Pacific Daylight Time  
**From:** Reconsideration (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Flip Petillion  
**CC:** Reconsideration  
**Attachments:** image001.png, ATT00001.txt

Dear Mr. Petillion,

Thank you for your prompt response.

The BAMC is agreeable to an extension of your clients' deadline to submit additional information relating to Request 16-11 from 2 April to 9 April 2018, provided that the submission is limited to ten pages and to any new information/argument based upon the CPE Process Review Reports.

We note your availability during the week of 23 April for a telephonic presentation and will revert once we have coordinated the Committee's schedules.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

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**From:** reconsider <reconsider\_bounces@icann.org> on behalf of Flip Petillion  
**Contact Information Redacted**

**Date:** Thursday, March 22, 2018 at 2:39 PM  
**To:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Re: [Reconsideration Request] Update on Reconsideration Request 16 11

Dear Members of the Board,

We hereby accept your invitation to make a telephonic presentation. We are available in the week of 23 April between 9:00 and 17:00 UTC.

In view of the upcoming Easter holiday and the fact that I represent a consortium of different applicants, I respectfully request to extend the deadline to submit the additional submission until 9 April 2018.

Thank you in advance.

Best regards,

Flip Petillion  
**Contact Information Redacted**

Contact Information Redacted

Contact Information Redacted

[petillion.law](#)

**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Monday, 19 March 2018 at 23:04  
**To:** Flip Petillion Contact Information Redacted  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Update on Reconsideration Request 16 11

Dear Mr. Petillion,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[icann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[icann.org\]](#) for the review the requests. In accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to submit additional information relating to Request 16 11, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16 11 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30 minute telephonic presentation in March and April with your response.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

## Rebuttal to the BAMC Recommendation in Reconsideration Request 18-6

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Requesters submit this Rebuttal to the Board Accountability Mechanisms Committee's ('BAMC') Recommendation on Reconsideration Request 18-6 (the 'Recommendation'). The Recommendation concerns Requesters' request that the Board (i) reverse Resolutions 2018.03.15.08 through 2018.03.15.11 (the '2018 Resolutions'), (ii) provide full transparency, (iii) organize a hearing for Requestors following disclosure of the documents asked for, and (iv) handle Reconsideration Request 18-6 ('RfR 18-6') together with Reconsideration Request 16-11 ('RfR 16-11').

In its Recommendation, the BAMC refuses to handle RfR 18-6 together with 16-11 and recommends the Board to deny RfR 18-6. However, as Requesters explain in this rebuttal, the BAMC's Recommendation is based on both factual errors and on a misrepresentation of Requesters' position and of the applicable rules.

### **I. FACTUAL ERRORS IN THE BAMC RECOMMENDATION**

#### **A. ICANN Has Not Considered the Correspondence Received after the Publication of the CPE Process Review Reports**

The BAMC opines that the ICANN Board (i) 'considered all material information when it adopted the 2018 Resolutions' and (ii) 'took into consideration [...] the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions'.<sup>1</sup> That is simply not true.

Following the publication of the CPE Process Review Reports, Requesters have sent three letters to the ICANN Board, laying out reasons why the ICANN Board should not accept the findings made in the CPE Process Review Reports. The first letter was sent on 16 January 2018, the second on 1 February 2018, and the third on 22 February 2018.

The 2018 Resolutions refer to the letter of 1 February 2018, but not the other two. The

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<sup>1</sup> BAMC Recommendation on Reconsideration Request 18-6 of 14 June 2018, p. 3

rationale of the 2018 Resolutions provides that the ICANN Board ‘understands the arguments raised in the letter’. However, the ICANN Board has ignored these arguments without any explanation. The Board did not consider a single argument and yet decided to accept the findings of the CPE Process Review Reports. The Board simply added that Requesters can submit their arguments in support of pending RfR 16-11 that was put on hold during the CPE Process Review. By making a decision before considering Requesters’ arguments, the ICANN Board is putting the cart before the horse.

#### **B. ICANN Has Not Resolved all Challenges**

According to the BAMC, all of the Requesters’ challenges have been resolved, with the exception of Reconsideration Request 16-11.<sup>2</sup> However, Reconsideration Request 16-11 cannot be seen in an isolated fashion. In Reconsideration Request 16-11, ICANN was asked to take appropriate measures vis-à-vis HTLD’s application for .hotel by cancelling said application. This request was already made on 5 June 2015, but, to date, ICANN has refused to take appropriate action, in spite of an IRP decision ruling that ICANN must take action. Also, Requesters’ requests for transparency on the CPE process and the CPE Process Review and their challenges to the lack of transparency thereof have been ignored (*infra*). Therefore, not all of Requesters challenges have been resolved.

#### **C. ICANN Has Ignored Requesters’ Requests for Transparency and Document Disclosure**

Requesters have always asked for full transparency in relation to the .hotel CPE, including in RfR 16-11. To date, ICANN has largely ignored this request and has failed to organize the CPE Process Review in an open and transparent manner in spite of being urged to do so by an IRP Panel.

On 17 September 2016, the ICANN Board instructed its President and CEO, or his designee(s), to undertake a review of the process by which ICANN has interacted with the

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<sup>2</sup> BAMC Recommendation on Reconsideration Request 18-6 of 14 June 2018, p. 4.



CPE provider.<sup>3</sup> At the time, there was no reason for Requesters to doubt ICANN being fully transparent about this review. On 26 April 2017, the Chair of the Board Governance Committee (BGC) informed Requesters about the status of the review. From this communication, it was apparent that the review was conducted by ICANN's President and CEO, as material was being collected 'as part of the President and CEO's review'. The material was going to be 'forwarded to the BGC in due course'.<sup>4</sup>

On 2 June 2017 (3 June 2017 at the recipient's end), ICANN suddenly informed Requesters that ICANN had selected FTI Consulting to perform the CPE Process Review.<sup>5</sup> On 14 June 2017, Requesters raised questions about ICANN's decision. Requesters asked the ICANN Board for (i) transparency about the selection process, (ii) details about FTI Consulting's mandate, (iii) the assurance that ICANN would take responsibility for ensuring compliance with ICANN's obligations, commitments and core values by FTI Consulting, etc.<sup>6</sup> On 11 July 2017, ICANN responded that it had forwarded this request to ICANN's Documentary Information Disclosure Policy (DIDP).<sup>7</sup> On 17 July 2017, ICANN staff decided that the requests made on 14 June 2017 to the ICANN Board were, to a large extent, 'not appropriate DIDP requests'.<sup>8</sup>

In response, Requesters made clear that their request for transparency was not addressed to ICANN staff within the framework of the DIDP, but to the ICANN Board. Requesters asked that the ICANN Board dealt separately with the part of the request that was considered inappropriate for the DIDP process. Requesters also challenged the reasons invoked by ICANN staff for their refusal to disclose certain documents.<sup>9</sup>

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<sup>3</sup> ICANN, *Approved Board Resolution 2016.09.17.01*, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>4</sup> ICANN, *Update on the Review of the New gTLD Community Priority Evaluation Process*, 26 April 2017, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>5</sup> ICANN, *Community Priority Evaluation Process Review Update*, 2 June 2017, <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>6</sup> Letter from Flip Petillion to ICANN Board of 14 June 2017 (**Exhibit 1**).

<sup>7</sup> Letter from ICANN to Flip Petillion of 11 July 2017, <https://www.icann.org/en/system/files/correspondence/icann-to-petillion-2-11jul17-en.pdf>.

<sup>8</sup> ICANN, *DIDP Request No. 20170614-1*, 17 July 2017, <https://www.icann.org/en/system/files/files/didp-20170614-1-petillion-obo-travel-reservations-srl-et-al-response-14jul17-en.pdf>.

<sup>9</sup> Letter of Flip Petillion to ICANN Board of 27 July 2017 (**Exhibit 2**).

These requests were made to the ICANN Board within the framework of RfR 16-11. To date, ICANN has not reacted to these requests.

**D. ICANN Has Not Provided Details Concerning the Selection Process for the CPE Process Reviewer**

The BAMC considers that ICANN ‘provided details concerning the selection process for the CPE process reviewer almost one year ago, in furtherance of its effort to operate to a maximum extent feasible in an open and transparent manner.’<sup>10</sup>

As a matter of fact, ICANN has given little detail on the selection process of the CPE process reviewer, and it has given far less information than is required from an organization that must ‘operate to the maximum extent feasible in an open and transparent manner’.

All ICANN did was inform Requesters that ‘FTI was chosen to assist in the CPE review following consultation with various candidates’ and that ‘FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.’<sup>11</sup> Requesters are left in the dark as to the selection criteria ICANN used, the identity of the ‘various candidates’, the skills and expertise ICANN considered required to undertake the investigation and how FTI objectively met the undisclosed requirements. As entities immediately affected by the investigation, Requesters are entitled to more transparency and accountability than a generic message that could have been used for just any service provider.

**II. THE BAMC’S MISCHARACTERIZATION OF REQUESTERS’ POSITION AND THE APPLICABLE RULES**

**A. BAMC’s Decision Prevents Requesters from Having a Fair, Neutral, Objective and Meaningful Review of their Complaints Made in Reconsideration Request 16-11**

Requesters are entitled to a fair, neutral, objective and meaningful review of their complaints made in the framework of RfR 16-11. Maintaining the 2018 Resolutions would mean that the ICANN Board fails to offer Requesters a meaningful review of their complaints regarding

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<sup>10</sup> BAMC Recommendation, p. 13.

<sup>11</sup> ICANN, Community Priority Evaluation Process Review Update, 2 June 2017, <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

HTLD's application for .hotel, the CPE process and the CPE Review Process made in the framework of RfR 16-11. Indeed, accepting the findings of the CPE Process Review and finding that no overhaul or change to the CPE process is necessary is incompatible with a fair, neutral and objective application of documented policies.

The BAMC maintains that there is no policy or procedure requiring the Board or ICANN to develop a particular methodology for the CPE Process Review<sup>12</sup> and concludes that, therefore, no policy violation was made.

However, the fact that ICANN has neither developed a particular methodology for the CPE Process Review nor disclosed the policies and procedures to be applied during CPE Process Review, is no proof that policies and procedures were applied correctly. One of the main purposes for the ICANN Board to organize the CPE Process Review was to *analyze* whether ICANN's policies and procedures were applied correctly during CPE. The related RfRs had been put on hold to make a meaningful review possible and to address the alleged inconsistencies in the CPE Process. The CPE Process Review has made no analysis whatsoever and the alleged inconsistencies have been left unaddressed. At the end of the day, the ICANN Board will need to decide whether or not it accepts the CPE results. The ICANN Board must exercise due diligence and care in making a reasoned decision and examine whether the CPE policies and procedures were applied consistently and correctly. Accepting a report that is based on flawed methodology does not qualify as reasoned decision-making, particularly when these flaws have been identified in correspondence of which the Board (i) acknowledges receipt, (ii) claims to understand the arguments, but (iii) refuses to address before taking a decision.

Requesters urged the ICANN Board to address Requesters' concerns and to hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review.

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<sup>12</sup> BAMC Recommendation, pp. 15-16.

## **B. Requesters Are Entitled to Due Process**

The BAMC acknowledges that it will consider the CPE Process Review Reports in the course of its evaluation of RfR 16-11, but then makes a convoluted argument as if Requesters have no due process rights in their dealings with ICANN.<sup>13</sup>

In making this argument, the BAMC is effectively ignoring that ICANN must comply with principles of international law, which includes due process. ICANN's Articles of Incorporation and Bylaws put principles of international law first, meaning that its Bylaws and accountability mechanisms cannot supersede principles of international law and must be interpreted in conformity with principles of international law, including due process.

Requesters' due process rights are violated if they are not given a fair opportunity to challenge FTI's reports. ICANN deprived Requesters from this opportunity by accepting FTI's conclusions before hearing and addressing Requesters' concerns. The fact that the BAMC refuses to hear RfRs 16-11 and 18-6 together limits Requesters' due process rights even further. The BAMC states that it will hear Requesters' arguments within the framework of RfR 16-11, but is refusing to reconsider a decision that it took while RfR 16-11 was pending and that greatly impacted Requesters' arguments without hearing Requesters first. Requesters cannot accept the BAMC's reasoning that both RfRs cannot be handled together because RfR 16-11 was filed under different (previous) Bylaws. Under the previous Bylaws, the BAMC was not involved in the consideration of RfRs. Yet, the ICANN Board has decided to have the BAMC take over the role of the BGC in RfR 16-11. ICANN cannot have it both ways and there is no reason why Requesters would be entitled to less robust accountability standards under RfR 16-11 than under RfR 18-6.

## **C. No Nondisclosure Conditions Apply to Requesters' Requests for Transparency**

The BAMC maintains that documents requested with respect to the CPE and the CPE Process

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<sup>13</sup> BAMC Recommendation, pp. 18-19.

Review are not made publicly available because they are subject to certain nondisclosure conditions.<sup>14</sup> ICANN also claims to have performed a balancing test, evaluating whether the public interest in disclosing documents outweighs the harm that may be caused by such disclosure.<sup>15</sup>

However, neither ICANN nor the BAMC provide any analysis on whether each requested document is covered by a nondisclosure condition. *E.g.*, ICANN responded to Requesters that ‘correspondence between the ICANN organization and the CPE provider is not appropriate for disclosure for the same reasons identified in ICANN’s response to [...] DIDP Request 20140804-1’.<sup>16</sup>

As already explained at length in our letter of 27 July 2017, ICANN cannot rely on its response to DIDP Request 20140804-1 to deny the disclosure of correspondence between the ICANN organization and the CPE provider. Rather than repeating the content of this letter, it is incorporated herein by reference.<sup>17</sup>

ICANN can also not expect Requesters to accept without question ICANN’s conclusion that the public interest is outweighed by the harm that may be caused by disclosure. ICANN must operate to the maximum extent feasible in an open and transparent manner. ICANN has not done so with respect to the CPE and the CPE Review Process. With respect to the CPE process, ICANN claims that its contract with the CPE provider does not require the disclosure of relevant documents. ICANN should not have entered into a contract that prevents documents relevant to the public interest from being shared with ICANN and disclosed to the public. In addition, nothing prevents ICANN from disclosing the documents it has access to. With respect to the CPE Review Process, the way in which FTI Consulting has been selected

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<sup>14</sup> BAMC Recommendation, p. 14.

<sup>15</sup> ICANN DIDP, Response to Request No. 20170614-1, 17 July 2017, <https://www.icann.org/en/system/files/files/didp-20170614-1-petillion-obo-travel-reservations-srl-et-al-response-14jul17-en.pdf>; ICANN DIDP, Response to Request No. 20180115-1, 14 February 2018, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>; BAMC Recommendation on Request 18-1, 5 June 2018, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

<sup>16</sup> ICANN DIDP, Response to Request No. 20170614-1, 17 July 2017, <https://www.icann.org/en/system/files/files/didp-20170614-1-petillion-obo-travel-reservations-srl-et-al-response-14jul17-en.pdf>.

<sup>17</sup> Letter of Flip Petillion to ICANN Board of 27 July 2017 (**Exhibit 2**).

is being kept secret; the names and *curricula vitae* of the FTI individuals involved in the review are being kept secret; many of the documents which were shared with the CPE Process Reviewers have been and still are kept secret; the terms and scope of FTI's work for ICANN are being kept secret; etc. Reconsidering the CPE process through a largely secretive review process clearly violates ICANN's obligation to be as open and transparent as possible.

#### **D. The BAMC Mischaracterizes the Despegar et al. IRP Declaration**

The BAMC submits that the *Despegar et al.* IRP Panel's finding that Requesters' description of inconsistencies regarding the CPE of .hotel have merit is 'an overstatement' and qualifies it as a side note.<sup>18</sup> The BAMC puts emphasis on the fact that the Panel's finding was made 'on the basis solely of the arguments provided by [the Requesters]'.

The reason why the finding was made 'on the basis solely of the arguments provided by [the Requesters]' is because Requesters' arguments have never been contested.

In addition, the Panel's finding was anything but a side note. The Panel wrote two extensive paragraphs on the need for providing consistency, although the Panel erroneously believed that there was little or nothing ICANN could do about it.<sup>19</sup> Considering that ICANN has been organizing the CPE Process Review, it can do something about it.

However, ICANN's obstinate refusal to look into, and effectively analyze, the consistency issues identified by Requesters confirms an unwillingness to address these issues.

#### **E. Requesters' Concerns About the CPE Process Review Have Never Been Addressed**

The lack of transparency surrounding the CPE Process Review made it impossible for anyone, including the ICANN Board, to assess the weight of the conclusions made by the CPE Process Reviewer. This concern, together with the CPE Process Reviewer's failure to consider the various fairness, nondiscrimination and consistency objections, has never been addressed. The BAMC proclaims that ICANN's 'accountability mechanisms, including this

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<sup>18</sup> BAMC Recommendation, p. 17.

<sup>19</sup> Despegar et al. IRP Declaration, §§ 146-147.

reconsideration request, provide affected parties like the Requestor (*sic*) with avenues for redress of purported wrongs, and substantively review the decisions of third-party service providers, including the CPE Provider.<sup>20</sup> However, to date, ICANN has consistently refused to substantively review the clearly erroneous decisions of the CPE Provider. The consistency issues with the .hotel CPE, which solely on the basis of Requesters' arguments have merit, have never been addressed, analyzed or even contradicted.

**F. The Fact that FTI Developed the Methodology for CPE Review is Irrelevant**

The BAMC argues that FTI, not the Board or ICANN, defined the methodology for the CPE Process Review Reports.<sup>21</sup> That is simply irrelevant. The Board charged ICANN's President and CEO or its designee(s) to perform the review. The Board remains responsible for assessing whether the report is based on a sound methodology and whether its conclusions are reliable. That is clearly not the case.

**G. The BAMC Mischaracterizes the Scope of the CPE Process Review**

The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not discuss or consider the various fairness, nondiscrimination and consistency objections. FTI did not ask whether the criteria the CPE Panel claimed to apply were the criteria laid out in the Applicant Guidebook and GNSO Policy. The approach followed by the CPE Process Reviewer was a 'description' of the CPE Panel's reports, but not an 'evaluation' to determine whether the CPE Panel's reports were actually following the applicable guidelines in a neutral and nondiscriminatory manner.

The BAMC attempts to justify this failure to analyze the consistency issues effectively by claiming that such analysis is beyond the scope of FTI's investigation. Requesters have difficulty understanding how analyzing consistency issues in the application of CPE criteria by the CPE provider would be beyond the scope of a report that is entitled 'analysis of the

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<sup>20</sup> BAMC Recommendation, p. 20.

<sup>21</sup> BAMC Recommendation, p. 15.

application of the community priority evaluation (CPE) criteria by the CPE provider in CPE reports'.<sup>22</sup> The report itself mentions that the BGC determined that the review would include 'an evaluation of whether the CPE criteria were applied consistently throughout each CPE report'. Moreover, ICANN's General Counsel confirmed in March 2017 that there was going to be 'a full look at the community priority evaluation', that the evaluators were 'digging in very deeply' and 'trying to understand the complex process of the new gTLD program and the community priority evaluation process'.<sup>23</sup> The lack of actual analysis in the report shows that FTI did not live up to this mission and that the results of the report should not be accepted. One ICANN Board member seems to have understood this and expressed her concern 'about the rigor of the study and some of its conclusions' in an abstention statement.<sup>24</sup> However, this criticism was effectively silenced by the Chair of the Board, who took the vote before hearing the abstention statement, hereby making it impossible for the Board to have an open discussion about legitimate concerns with respect to FTI's report which echoed Requesters' criticism.

### III. CONCLUSION

Based on the foregoing and on the reasons expressed in RfR 18-6, Requesters respectfully request that the Board deny the BAMC Recommendation and grant RfR 18-6.

Respectfully submitted,

29 June 2018

  
Flip Petillion  
*Counsel for Requesters*

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<sup>22</sup> FTI Scope 2 Report, *Analysis of the application of the community priority evaluation (CPE) criteria by the CPE provider in CPE reports*, 13 December 2017, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>23</sup> ICANN, *Transcripts Copenhagen – Public Forum 2*, 16 March 2017 – 13:45 to 16:45 CET, [https://sched.ws/hosted\\_files/icann58copenhagen2017/60/158CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](https://sched.ws/hosted_files/icann58copenhagen2017/60/158CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), p. 12.

<sup>24</sup> San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>, pp. 12-13.